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Communication 298/05

Zimbabwe Lawyers for Human Rights (on behalf of Roy Bennett)

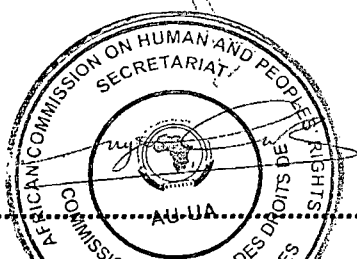
v

Republic of Zimbabwe

Adopted by the

African Commission on Human and Peoples' Rights

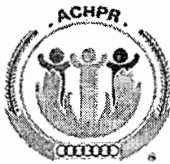
During the 70th Ordinary Session done virtually from 23 February to 09 March 2022.



Hon. Commissioner Remy Ngoy Lumbu
Chairperson to the African Commission
on Human and Peoples' Rights



Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples'
Rights



Communication 298/05 – Zimbabwe Lawyers for Human Rights (on behalf of Roy Bennett) v Zimbabwe

Summary of the Complaint:

1. The Complaint is filed against the Republic of Zimbabwe¹ (the Respondent State) by the Zimbabwe Lawyers for Human Rights (the Complainant) on behalf of Roy Bennet (the Victim), who was an elected opposition Member of Parliament for Chimanimani District at the time.
2. The Complaint alleges that the Victim has been mistreated and unlawfully imprisoned by the political authorities of the Respondent State. At the time the Complaint was brought, the Victim was incarcerated at a rural prison where he was serving a 12 months jail term with hard labour. The sentence was imposed by the Parliament of Zimbabwe on a conviction for contempt of Parliament.
3. The Complainant alleges that the charge of contempt of Parliament against the Victim arose in 18 May 2004 from an incident in Parliament during a parliamentary debate on a Stock Theft bill.
4. The Complainant avers that during the parliamentary debate on the Stock Theft bill, the Victim came under verbal assault by the Respondent State's Minister of Justice who is a member of the ruling party. Enraged by the verbal assault, the Victim was said to have approached and shoved the Minister to the floor.
5. Following the events that occurred in Parliament on 18 May 2004, the Complainant alleges that a Parliamentary Committee was established to try the Victim for contempt of Parliament. The Victim allegedly protested that the proceedings were discriminatory on the grounds that the Victim alone was charged even though the disruption of Parliament was occasioned by a scuffle involving the Minister of Justice and another Member of Parliament representing the ruling party.
6. The Complainant avers that the Victim also challenged the composition of the Parliamentary Committee on the grounds that it comprised of members of the ruling party who were his accusers. Despite his

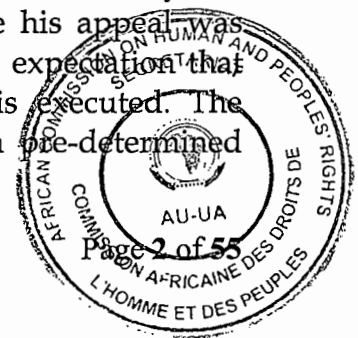
¹ The Republic of Zimbabwe is a state party to the African Charter which it ratified on 30 May 1986





protestations, the Victim was tried, found guilty of contempt and sentenced to 12 months in prison with hard labour.

7. The Complainant states that the trial by the Parliamentary Committee was a continuation of an official policy of victimisation aimed at the Victim by the Respondent State. The Complainant claims for instance that among other things, the Victim's election as Member of Parliament for the Chimanmani District had previously brought harassment and violence directed against the Victim and his family. There were also attacks allegedly made on the Victim's farm and his farm workers by persons suspected to be in the employment of the Respondent State. The Victim was allegedly subjected to all forms of retributive treatment.
8. The Complainant alleges further that the Victim has also been the target of discriminatory land confiscation by Respondent State. The Complainant claims that although the Victim had purchased a desolate portion of land from the land-owning community, performed all customary rites and obtained a "Certificate of no present interest" from the Government, the Respondent State had unlawfully targeted the Victim's land for confiscation.
9. According to the Complainant, the confiscation is aggravated by the fact that the Victim's land was targeted after he had turned the fortune of the farm around from its barren state. The Complainant avers further that the Victim's farm was confiscated allegedly as part of Respondent State's fast track land reform programme, in spite of court orders in his favour barring the State from interfering with the Victim's property. All judgments made by national courts in the Victim's favour are said to have been disregarded by the Respondent State.
10. The Complainant states further that in an attempt to seek protection from the law, the Victim carefully documented the incidents of violence against him, his family and his employees. The Victim was said to have written letters of complaint to the authorities of the Respondent State including the Minister of State Security, the Minister of Home Affairs and the Head of Agritex. These letters allegedly did not yield any positive results.
11. In relation to the alleged violation in the present Communication, the Complainant alleges that the Victim challenged his conviction by the Parliamentary Committee but was sent to prison while his appeal was pending before the Supreme Court, despite the Victim's expectation that his appeal would be completed before the sentence is executed. The Complainant states that this was further evidence of a pre-determined targeting of the Victim.





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Articles alleged to have been violated:

12. The Complainant alleges that the Respondent State has violated Articles 1, 2, 3, 4, 5, 6, 7(1) (a), 10, 11, 13, 14, 18 and 26 of the African Charter.

Prayers

13. The Complainant prays the African Commission on Human and Peoples' Rights (the Commission) to:
- Make a declaration that the Respondent State has violated Articles 1, 2, 3, 5, 6, 7(1) (d), 10, 11, 13, 14, 18 and 26 of the African Charter.
 - Urge the Respondent State to:
 - Eject all persons unlawfully occupying the Charleswood Estate and other properties of the Victim with immediate effect;
 - In the alternative, pay the Victim adequate compensation in United States dollars being the currency of reference in Zimbabwe, for the expropriation of Charleswood Estate, and all his other properties in accordance with the principles of international law;
 - Ensure the return of all surviving farm labourers to their dwellings;
 - Guarantee the return of all equipment which was unlawfully possessed;
 - Pay adequate compensation for all the destroyed properties and livestock as per their current value;
 - Investigate the extra judicial killings, torture, rapes, destruction of property and other violations of rights of all affected persons who were lawfully residing on the farms;
 - Respect, enforce and obey all court orders.

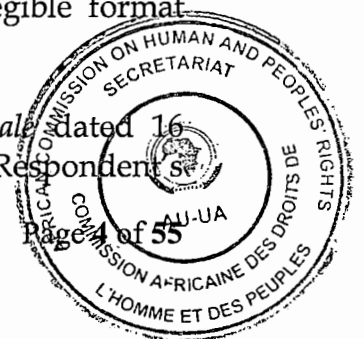
Procedure:

14. The Complaint which was dated 3 February 2005 was received along with a request for Provisional Measures, by the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 14 February 2005. On 25 February 2005, the Secretariat informed the Complainant that the Complaint had been registered and slated for consideration by the African Commission on Human and Peoples' Rights (the Commission) at its 37th Ordinary Session.





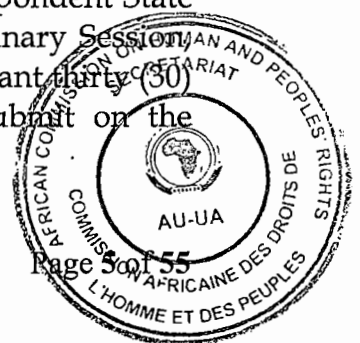
15. On 27 April 2005, the Complainant filed another formal request for Provisional Measures seeking the release of the Victim from Prison custody pending the determination of his case.
16. In compliance with Article 57 of the African Charter, notice of the Complaint and the request for Provisional Measures, along with a copy thereof, was communicated to the Respondent State on 5 May 2005.
17. On 8 May 2005, the Respondent State filed its preliminary submissions on the Complainant's request for Provisional Measures. The Respondent State filed further arguments in objection of the request for Provisional Measures on 1 June 2005.
18. After hearing the oral arguments of the Complainant and considering the Respondent State's Submissions in respect of the request for Provisional Measures, the Commission declined the request in view of the fact that the request had been overtaken by events.
19. On 18 August 2005, the Secretariat wrote to both Parties to inform them that the Commission had considered the Complaint at its 37th Ordinary Session and had decided to be seized of it. The Secretariat also requested the Complainant to forward its Submissions on Admissibility.
20. Between 18 August 2005 and 3 November 2006, letters were exchanged between the Secretariat and the Parties concerning the submission of their respective arguments on the Admissibility of the Communication. During the 39th Ordinary Session of the Commission held in May 2006, the Respondent State submitted its argument on the Merits although no Submissions on Admissibility had been made.
21. On 25 November 2006 the Complainant's argument on Admissibility was received at the Secretariat and receipt acknowledged by a letter dated 8 December 2006.
22. Between May 2007 and December 2011, several other letters were exchanged between the Secretariat and the Parties concerning the Respondent State's Submissions on Admissibility. The Secretariat also communicated with the Parties on the need for submission of legible copies of all relevant national decisions and judgments by both parties. Copies of relevant national decisions and judgments in legible format were finally received from the Complainant on 22 April 2008.
23. On 23 January 2012, the Secretariat received a *Note Verbale* dated 16 January 2012 from the Respondent State submitting the Respondent's





Observations on Admissibility. The Respondent State's Observations on Admissibility were acknowledged on 31 January 2012 and forwarded by letter dated 31 January 2012 to the Complainant, along with a request for their comment on the State's submission.

24. The Complainant's response to the Respondent State's submission on Admissibility was received at the Secretariat on 13 March 2013.
25. During its 53rd Ordinary Session, the Commission deferred the consideration of the Communication and the Parties were accordingly informed.
26. At its 13th Extra-Ordinary Session held in Nairobi, Kenya, from 20 to 24 July 2013, the Commission declared the Communication Admissible. Notice of the Commission's decision was transmitted to the Parties by letter and *Note Verbale* respectively on 24 September 2013. The letter attaching a copy of the decision was transmitted to the Complainant by courier (DHL) on 26 September 2013.
27. By the same letter, the Complainant was requested, in terms of Rule 108(1) of the Rules of Procedure (RoP) 2010, to submit written arguments and supporting evidence on Merits within 60 days of notification, thus latest by end of November 2013.
28. By letter of 7 January 2014, the Complainant acknowledged receipt of the Secretariat's letter of 19 December 2013, and indicated that it had not received any notification or a copy of the decision on Admissibility, let alone a request to file merit submissions. This was followed by another letter dated 5 March 2014 received by email on 6 March 2014 in which the Complainant requested an extension of time within which to file merit submissions in the event that the Communication had been declared admissible. The request for extension of time was granted by the Commission.
29. On 3 May 2014, the Secretariat received the Complainant's submissions on the Merits and transmitted the same to the Respondent State on 5 May 2014.
30. By letter of 12 March 2015, the Secretariat informed the Respondent State about the Commission's decision during its 17th Extra-Ordinary Session held from 19 - 28 February 2015 in Banjul, The Gambia, to grant thirty (30) additional Calendar days for the Respondent State to submit on the Merits.





31. The Respondent State submitted on the Merits in March 2015 and the submissions were transmitted to the Complainant by letter dated 24 April 2015.
32. The Complainant made observations on the Respondent State's submissions on the Merits received at the Secretariat on 28 May 2015, and transmitted to the Respondent State by Note Verbale of the same date.
33. Consideration of the Communication and decision on the Merits was deferred during subsequent Sessions of the Commission.

Request for Provisional Measures

34. The Complainant's request for Provisional Measures which was filed along with the Complaint on 3 February 2005 and resubmitted on 27 April 2005 was considered at the 37th Ordinary Session of the Commission and declined by the Commission as it had been overtaken by events.

The Law on Admissibility

Submission of the Complainant

35. The Complainant submits that it has complied with all the requirements for Admissibility under Article 56 of the African Charter and the Communication should be declared admissible.
36. Regarding Article 56(1) of the African Charter, the Complainant submits that the requirement in those provisions have been satisfied since the Communication is not anonymous.
37. In relation to Article 56 (2) of the African Charter, the Complainant submits that the facts raised in the Communication allege a violation of provisions of the African Charter. Thus, the Complainant argues that the facts and issues in dispute fall within the *rationae materiae* and *rationae personae* jurisdiction of the Commission. The Complainant contends further that the issues raised in the Communication are within the scope of the Constitutive Act of the African Union (AU Constitutive Act). Accordingly, the Complainant asserts that it has complied with Article 56(2) of the African Charter.





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38. Concerning Article 56 (3) of the African Charter, the Complainant submits that the language used in the Communication is not disrespectful of the Respondent State or any Organ of the African Union (AU).
39. In relation to Article 56 (4) of the African Charter, the Complainant claims that although reference is made to statements uttered by individuals on national television, in Parliament and in political meetings, the Communication is not based exclusively on news disseminated through the mass media. The Complainant claims that the Communication is based on affidavits filed in local courts and on the decision of those court as well as statements uttered in various context but that have bearing on the matter at hand.
40. With regards to Article 56 (5) of the African Charter, the Complainant contends that the requirement to exhaust local remedies has been satisfied in relation to the Communication because local remedies in the Respondent State have proved to be 'ineffective, illusory and unavailable'. The Complainant submits that local remedies are ineffective, illusory and unavailable because several court orders in favour of the Victim have been "defied and disobeyed" by the Respondent State such that the national legal system had failed to provide redress for the Victim.
41. The Complainant argues further that attempts to have the presently contested decision of Parliament reviewed by the national courts have either been stalled by the issuance of orders that the matter had been finalised in terms of the relevant Act or have been unduly delayed, especially by the Supreme Court. The Complainant submits that the Victim served out the prison term complained of before the Supreme Court of Zimbabwe reached its decision on the case pending before it.
42. The Complainant argues further in relation to Article 56(5) of the African Charter that in spite of the fact that it had appealed against the decision of the Parliament to the Supreme Court of the Respondent State, that appeal was essentially academic as it was aware that the Supreme Court upholds the sanctity of the decisions of Parliament. The Complainant contends that by failing to subject the decision of Parliament which had exercised jurisdiction as a special court to the scrutiny of fair trial guaranteed in the African Charter, the Respondent State had failed to provide effective local remedy. The Complainant argues that this was the situation that warranted the request for provisional measures while an appeal was pending before the Supreme Court of the Respondent State. The Complainant contends that it has shown that local remedies were





unavailable and ineffective such that the onus has shifted to the State to demonstrate that local remedies were available and effective.

43. As to Article 56 (6) of the African Charter, the Complainant contends that the Communication has been submitted in a timely manner.
44. In relation to Article 56(7) of the African Charter, the Complainant submits that the Communication complies with the provisions of the sub-article as the Communication does not deal with a case which has been settled by any relevant procedure.

Respondent State's submission on Admissibility

45. The Respondent State does not dispute the Complainant's assertions regarding its satisfaction of the Admissibility requirements in Article 56 (1) (3) (4)(6) and (7) of the African Charter.
46. In relation to Article 56(2) of the Charter, the Respondent State submits that there is a requirement that any Communication submitted "should prove a *prima facie* ... violation of a specified Article". Hence, the State argues that the present Communication does not meet the requirement in the sub-article because the Communication fails to "show with sufficient clarity what violation, and how the violation is supposed to have been committed". This, the State contends is an indication that the "facts do not fall within the *rationae materiae* of the jurisdiction of the Commission". The Respondent draws the attention of the Commission to its decision in *Chinhamo v Zimbabwe*.²
47. The Respondent State gives its version of the facts leading up to the Communication and submits that the Victim was summoned and was represented before the Parliamentary Committee. For that reason, and because Parliament is empowered by law to impose a fine and imprisonment for up to two years, the State argues that the conviction and sentencing of the Victim were done according to law.
48. The Respondent argues further that "there has been no violation of Article 14 of the Charter as the land acquisitions were made 'in the interest of public need' for land and 'in accordance with the provisions of appropriate laws". Thus, the State contends that the Communication does not show a *prima facie* case of any violation and has therefore failed to meet the requirement in Article 56(2) the African Charter.

² Communication 307/2005





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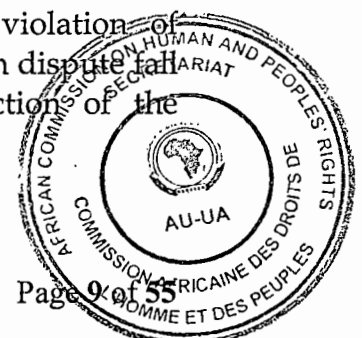
49. With regards to Article 56(5) of the African Charter, the Respondent State contends that local remedies have not been exhausted because an appeal against the incarceration of the Victim was brought before the Supreme Court of the Respondent State but the Complainant rushed to the Commission and filed this Communication before the appeal was resolved by the Supreme Court. The Respondent State argues that the action of the Complainant has deprived it of the opportunity to first address the dispute. The Respondent argues that the action of the Complainant amounts to forum shopping which the Commission has condemned in its decision in *Interights v Namibia*.³
50. The Respondent State contends further that the exceptions to the rule of exhaustion of local remedies do not apply in favour of the Communication because the requirement that local remedies should be effective does not necessarily mean that the outcome of national proceedings should be in favour of the Victim. The State argues further that local remedies were effective contrary to the Complainant's claim and that the State did not comply with only the national decisions that it had appealed against. The Respondent contends that it had appealed against "most of the cases" mentioned by the Complainant. Accordingly, the Respondent State argues that the exceptions to the rule do not apply in this case.
51. The Respondent State argues further that the Complainant was not interested in exhausting local remedies since it did approach the Supreme Court over the alleged refusal to obey the court orders in its favour and the Victim did not await the final decision of the Supreme Court. Thus, the Respondent State contends that the Commission would be "setting a dangerous precedent if it were to admit a case based on a Complainant's apprehension about the perceived lack of independence of a country's domestic institutions". In support of this position, the Respondent State refers to the decision in *Kenyan Section of the ICJ v Kenya*.⁴ Hence, the Respondent State asserts that the Complainant has not exhausted local remedies.

Complainant's Response to Respondent State's Submission

52. In response to the Respondent State's contention that the Communication does not meet the requirement in Article 56(2) of the African Charter, the Complainant argues that the Communication alleges a violation of provisions of the African Charter. Thus, the facts and issues in dispute fall within the *rationae materiae* and *rationae personae* jurisdiction of the

³ Communication 239/2001- *Interights v Namibia* (2001) ACHPR

⁴ Communication 263/2002 -*Kenyan Section of the ICJ v Kenya* (2004) ACHPR





Commission. The Complainant contends further that the issues are also within the scope of the AU Constitutive Act.

53. The Complainant argues that the requirement to show a *prima facie* violation of the Charter only requires the latter to show that a human rights violation may have occurred. Accordingly, the Complainant contends that it has set out a *prima facie* case that is compatible with the AU Constitutive Act and the African Charter.

54. In response to the Respondent State's argument that local remedies had not been exhausted as required by Article 56(5) of the Charter, the Complainant asserts that it has "gone to lengths to demonstrate how the local remedies in this case have proved to be ineffective, illusory and unavailable". Citing the case of *Akdivar v Turkey*⁵ heard by the European Court of Human Rights (ECtHR), the Complainant contends that a remedy should be "an effective one, available in theory and in practice at the relevant time". The Complainant contends further that the judgment handed down by the Supreme Court of Zimbabwe in **Case no SC75/05** filed by the Victim "actually reinforces the ... submission that there are no domestic remedies available to him". Thus, the Complainant asserts that "the burden of proving the existence of available and sufficient domestic remedies lies upon the State".

The Commission's Analysis on Admissibility

55. The Communication is brought under Article 55 of the African Charter. Accordingly, it needs to satisfy the seven Admissibility requirements laid out in Article 56 of the African Charter. As the Commission has previously held, the conditions in Article 56 of the Charter apply conjunctively and cumulatively.⁶ This means that a failure to satisfy any one or more of those conditions renders the Communication inadmissible.⁷

56. The Commission notes that in the present Communication, the parties are in agreement that the conditions laid out in Article 56 (1), (3), (4), (6) and (7) of the African Charter have been met. The Commission's own assessment of the Communication also confirms that the conditions in those provisions have been satisfied. Accordingly, the Commission's analysis will focus on the requirements in Article 56 (2) and (5) of the Charter.

⁵*Akdivar v Turkey* (1996) ECtHR (Application No 21893/93)

⁶ See Communication 304/2005 - *FIDH, National Human Rights Organization (ONDH) and Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Senegal* (2006) ACHPR para 38

⁷*Article 19 v Eritrea* (2007), para 43





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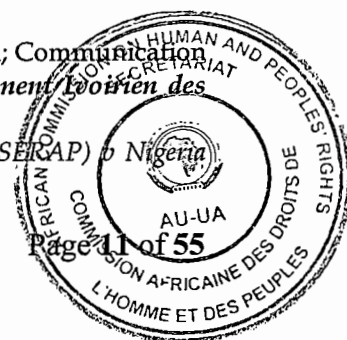
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57. Article 56(2) provides that a Communication should be compatible with the Charter of the Organisation of African Unity (now the AU Constitutive Act) or the African Charter. The Commission notes that the provision is to be read conjunctively to mean that a Communication should be compatible with both the AU Constitutive Act and the African Charter. The Respondent State contends that the present Communication does not satisfy this condition because it shows no *prima facie* violation of the African Charter.
58. It is also the Respondent State's argument that the Communication does not show with sufficient clarity what rights have been violated and how those rights have been violated by the State. The Complainant responds that the requirement is for a Communication to demonstrate that African Charter protected rights may have been violated by the Respondent State.
59. In a number of earlier decisions, the Commission has held that as used in Article 56(2) of the African Charter, the term "compatible" means to be "in compliance with" or "in conformity with" or "not contrary to" or "against" the AU Constitutive Act or the Charter.⁸ The Commission notes that there are two parts to Article 56(2) of the Charter. The first part requires that a Communication should not contradict or be contrary to the principles of the AU Constitutive Act. This simply means that the claim(s) in a Communication should not offend the spirit and purpose of the AU Constitutive Act. The second part requires that a Communication should allege a violation of a right or rights recognized in the African Charter. In other words, the claim in a Communication should conform with and not contradict the rights that are guaranteed in the Charter.
60. The Commission has also previously held that Article 56(2) of the Charter requires a Communication to indicate a *prima facie* violation of the African Charter.⁹ The Respondent State contends that this obligates the Complainant to show with sufficient clarity what violations have occurred and how those violations have occurred. The Commission notes that the term *prima facie* as used in its jurisprudence does not impose an obligation to "show with sufficient clarity" the alleged violations that have triggered the submission of a complaint. Instead, the Commission notes that it simply requires that at face value or upon mere sighting, without requiring either party to adduce any evidence, it should be possible to

⁸ See Communication 252/2002 - *Bissangou v Republic of Congo* (2006) ACHPR; Communication - *Chinhamo v Zimbabwe* (2007) ACHPR; Communication 246/2002 - *Mouvement pour le Développement des Droits Humains (MIDH) v Côte d'Ivoire* (2008) ACHPR

⁹ See Communication 300/2005 - *Social and Economic Rights Action Project (SERAP) v Nigeria* (2008) ACHPR, para 38.





come to a conclusion that the Communication can be accommodated within the competence of the Commission on the grounds that it alleges that rights recognized by the African Charter have been violated.¹⁰

61. In the present Communication, the Complainant alleges that rights guaranteed by the African Charter have been violated by the Respondent State. The Complainant goes further to list the provisions of the Charter that have allegedly been violated even though there is no obligation on a Complainant to mention specific provisions of the Charter that have been violated.¹¹ Accordingly, the Commission finds that the Complainant has met the requirement to show a *prima facie* violation of the African Charter.
62. The Commission further notes that the rights claimed in the Communication do not contradict the principles of the AU Constitutive Act. The Communication also meets the *rationae materiae* and the *rationae personae* competence of the Commission since it raises issues relating to the alleged violation of rights in the African Charter and it is brought by a competent entity against a State Party to the Charter.¹² Thus, in accordance with its established jurisprudence, the Commission finds that the Communication is compatible with the AU Constitutive Act and the African Charter.
63. In relation to Article 56 (5) of the African Charter, the Respondent State contends that the Communication is inadmissible because the Complainant has failed to exhaust available local remedies. Article 56(5) provides that Communications should be "sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." This requirement is based on the principle that "the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual."¹³
64. The Commission has previously held that the requirement to exhaust local remedies does not apply where such remedies are "unavailable or ineffective"¹⁴ or where they are "unduly and unreasonably prolonged".¹⁵ It is therefore firmly established in the jurisprudence of the Commission that

¹⁰ See Communication 333/06 - *Southern Africa Human Rights NGO Network & Others v Tanzania*, para 51

¹¹ *Ibid.*

¹² See *Chimhamo v Zimbabwe* (2007)

¹³ Communication 71/92 - *Rencontre Africaine pour la Defense des Droits de l'Homme* (1997) ACHPR

¹⁴ *Ibid.*

¹⁵ Communication 275/2003 - *Article 19 v Eritrea* (2007) ACHPR para 48





in order for the rule of exhaustion of local remedies to apply, remedies in the Respondent State must be available, effective and sufficient.¹⁶

65. The Respondent State contends that local remedies have not been exhausted by the Complainant in the present Communication because the Complaint was submitted to the Commission whilst an appeal filed by the Victim before the Supreme Court of the Respondent State upon the same facts was still pending. The Respondent State argues further that the exceptions to the exhaustion of local remedies rule do not apply to the present Communication since the Complainant has failed to take advantage of effective and available remedies provided by the State.
66. The Commission recalls its established jurisprudence that a State which alleges that a Complainant has failed to exhaust local remedies "has the burden of showing that the remedies ... are available, effective and sufficient to cure the violation alleged".¹⁷ As is evident from the Commission's decision in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*,¹⁸ the Respondent State's burden of demonstrating that effective and sufficient local remedies exist has always been recognised under the African Charter. It is a practice that is also firmly entrenched in international human rights law from which the Commission is authorised by Articles 60 and 61 of the Charter to draw inspiration from.¹⁹ Accordingly, the initial burden to prove the availability of effective and sufficient remedies within its legal system rests on the Respondent State.
67. The Respondent State claims that the Complainant should have pursued the matter to a logical conclusion before the Supreme Court as the dispute was already before that Court. Although the Complainant alleges that accessing national courts was futile because the State has failed to implement previous court decisions in favour of the Victim, the Respondent State argues that it had only failed to implement those decisions because it appealed against most of them.
68. The Respondent State contends further that the allegation of non-implementation of national decisions ought to have been brought before the Supreme Court in the same manner the current dispute had been submitted before the Supreme Court. Considering the ultimately negative

¹⁶ See Communication 147/95 - 149/96 - *Jawara v The Gambia* (2000) ACHPR para 33; *SPRAC and Socio Economic Rights and Accountability Project v. Nigeria* (2008) para. 45

¹⁷ *Article 19 v Eritrea* (2007) para 51

¹⁸ *Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia* (1997), para 17

¹⁹ See *De Wilde, Ooms and Versyp (Vagrancy case) v Belgium* (1972) ECtHR, (Series A, no 14) para 60; *Valesquez-Rodriguez v Honduras* (1988) IACtHR (Series C, No 4)





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outcome of the case submitted to the Supreme Court, the Respondent State argues that effectiveness of local remedies does not mean that national proceedings should be in favour of the victim.

69. The Commission must first deal with the question whether the Communication is inadmissible on the grounds that it was filed while the Supreme Court of the Respondent State was still seized of the matter. The Commission notes that Article 56 of the African Charter has to be applied with flexibility.²⁰ The Commission recalls that it is also firmly established in international human rights law and practice that the exhaustion of local remedies rule must be applied with "some degree of flexibility and without excessive formalism".²¹
70. The Commission notes that although the Complaint was filed with the Secretariat before the final resolution of the appeal lodged at the Supreme Court, the Communication was not considered before the conclusion of that appeal by the Supreme Court. In the Commission's view, in appropriate cases, a flexible interpretation and application of Article 56(5) of the African Charter allows the Commission to receive a Complaint even when an appeal is still pending at the national level. However, the Commission will only consider such a Communication after the fact of the conclusion of the appeal has been transmitted to the Secretariat. In the Commission's view, what constitutes an appropriate case will be determined on a case-by-case basis but generally relates to circumstances where the urgency of the situation warrants immediate access to the Commission in order to avoid imminent danger to life, liberty or property.
71. In the present Communication, the Commission notes that at the time the Complaint was filed, the Victim was faced with the imminent risk of imprisonment to serve the jail term against which he had appealed to the Supreme Court. It is the failure of the Supreme Court to stay execution of the decision of the Parliament Committee against which the Victim had appealed that forced the Complainant to come before the Commission.
72. The Commission recalls that by Articles 60 and 61 of the African Charter, the Commission is encouraged to draw inspiration from international human rights law. In this regard, the Commission finds the experience of the ECtHR useful on this point. Faced with a similar challenge in *Ringeisen v Austria*,²² the ECtHR took the view that "while it is fully upheld that the

²⁰ Communication 304/05 FIDH - Organisation nationale des droits de l'Homme (ONDH) and Rencontre africaine pour la défense des droits de l'Homme (RADDHO) v Senegal

²¹ See *Lehtinen v Finland* (2006) ECtHR (Application no 43160/98) p 7; *Horvat v Croatia* (2000) ECtHR (Application No 51585/99) para 40

²² ECtHR (1971), (Application no 2614/65) para 91





applicant is ... duty bound to exercise the different domestic remedies before he applies to the Commission, it must be left open to the Commission to accept the fact that the last stage of such remedies may be reached shortly after the lodging of the application but before the Commission is called upon to pronounce itself on admissibility".

73. The position of the ECtHR is further reinforced in *Taright et al v Algeria*, where the United Nations Human Rights Committee (UN HRC) has also held that the question of exhaustion of local remedies can be assessed at the consideration of the Communication rather than at the time of submission of the Complaint.²³
74. The Commission notes that along with the Complaint, the Complainant had filed a request for Provisional Measures to prevent the imminent risk of imprisonment that the Victim faced while his appeal was still pending before the Supreme Court of the Respondent State. The Commission notes that in those situations where a genuine need for urgent intervention exists as a result of an impending danger to life, liberty or property, a strict requirement that local remedies must be exhausted before a Complainant can come before the Commission is likely to defeat the purpose of the African Charter. In such situations of urgency, it is impracticable and undesirable to insist that a Complainant must wait till pending proceedings in national courts are concluded before a Complaint is brought to the Commission.²⁴
75. As the Commission has already noted, although the Complaint was filed before the conclusion of the appeal before the Supreme Court of the Respondent State, the consideration of the present Communication on Admissibility is taking place after the conclusion of that appeal. This means that even though the last stages of the domestic proceedings took place after the filing of the Communication, consideration of the Communication is only taking place after the conclusion of the national proceedings. The Commission therefore finds that there is substantial compliance with Article 56(5) of the Charter on this point.
76. Regarding the Respondent State's argument that the exceptions to the exhaustion of local remedies rule do not apply to the present

²³Communication No. 1085/2002 - *Taright et al v. Algeria*, Views adopted 15 March 2006, para. 7.3; where the Respondent State argued that the Communication was submitted before local remedies were exhausted and while the Complainant was still pursuing those local remedies. Also see Communication No. 925/2000 - *Kuok Koi v. Portugal*, Decision adopted 22 October 2003, para. 6.4.

²⁴ Also see the SADC Tribunal case of *Campbell (Pvt) Limited & Others v Zimbabwe* (2007) AHRLR 141 (SADC 2007) para 15





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Communication, it is incumbent on the Respondent to demonstrate that effective and sufficient local remedies are available at the national level. In its decision in *Jawara v The Gambia*, the Commission held that "a remedy is considered available only if the applicant can make use of it in the circumstances of his case".²⁵ In *Chinhano v Zimbabwe*, the Commission also held that "remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint".²⁶

77. The Respondent State argues that the alleged violations which are primarily ascribed to an action by the Parliament are redressable by the national courts, especially the Supreme Court. The Commission notes the Complainant's submission that even the decision finally handed down by the Supreme Court reinforces the argument that there is no effective domestic remedy for the Victim. The Commission notes the conclusion reached by the Supreme Court that the Parliament is a special Court and the failure of Parliament to "follow certain procedures that are followed in a court of law does not necessarily mean that such hearing is not fair or impartial".²⁷

78. In the face of such established domestic law, the Respondent State has not shown that the Supreme Court or any other court had any prospect of redressing the violation alleged by the Victim. On this point, the Commission finds that the Respondent State has not discharged the onus to show that the local remedy it is holding out is effective since from the onset, there was no prospect of success. The Commission agrees with the Respondent State that effectiveness does not necessarily mean that national proceedings must be in favour of the Victim.²⁸ However, the Commission takes the view that effectiveness means that the remedy is "capable of producing the result for which it was designed".²⁹ The remedies in the present situation do not show any such prospect. The Commission therefore finds that the Respondent State has not shown that effective local remedies which should have been exhausted by the Complainant are available.

79. The Respondent State also submits that the Complainant has failed to approach the Supreme Court with a complaint that national decisions in

²⁵*Jawara v Gambia* (2000) para 33

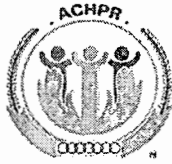
²⁶*Chinhano v Zimbabwe* (2007), para 54

²⁷Pg 16 of the judgment of the Supreme Court of Zimbabwe in *Roy Bennet v Minangawa & Others*, Judgment No SC 75/05

²⁸ Also see *Valesquez-Rodriguez v Honduras* (1988), para 67

²⁹*Id*, para 66





favour of the victim have not been implemented. The Commission notes and agrees with the jurisprudence of the ECtHR that local remedies are ineffective and therefore not required to be exhausted where violations are actively perpetuated or at least, tolerated by the State and its agents.³⁰ In the face of undisputed claim that national decisions in favour of the victim have never been implemented by the Respondent State, the Commission is of the view that requiring the same victim to exhaust local remedies would amount to a futile exercise.

80. The Commission further notes and agrees with the view that where "the general legal and political context in which they operate as well as the personal circumstance of the applicant" indicate that local remedies are ineffective in respect of a particular applicant,³¹ "resort to those remedies becomes a senseless formality".³² As noted, although the victim had obtained multiple court orders, as indicated in the minority judgment of the Supreme Court of the Respondent State, the State has not disputed or challenged the claim that the victim has encountered difficulties in enforcing these orders.³³ In the face of such a reality, the Respondent State has failed to demonstrate that local remedies were effective and sufficient as far as the victim is concerned. Accordingly, the Commission rules that the requirement to exhaust local remedies in Article 56(5) of the Charter has been satisfied.

Decision of the Commission on Admissibility

81. In view of the above, the African Commission on Human and Peoples' Rights declares this Communication Admissible in accordance with Article 56 of the African Charter.

Consideration of the Merits

Complainant's submissions on the Merits

Alleged violation of Article 2 of the African Charter

82. The Complainant submits that the Victim has suffered discrimination in violation of Article 2 of the African Charter. The Complainant avers that

³⁰ See *Akdivar v Turkey* (1996) para 67

³¹ See *Lehtinen v Finland*, p7

³² *Valesquez-Rodriguez v Honduras* (1988), para 68

³³ See the dissenting judgment of Sandura JA in the Supreme Court of Zimbabwe Judgment No SC 75/05.





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from May 2000 to January 2005, the victim endured a relentless barrage of attacks from agents in the direct or indirect employ of the Respondent State. They submit that these abuses were both physical and verbal attacks on the Victim, which resulted in: the death of two employees, a miscarriage suffered by the Victim's wife while she was held hostage during one of the attacks, the rape of two female employees and the physical assault and illegal detention of the Victim's employees, who subsequently fled from their home on his estate.

83. The Complainant submits that the victim was imprisoned for 12 months with hard labour at a maximum security prison on spurious conviction of contempt of Parliament, and to date continues to live in fear for his life should he return to Zimbabwe. The Complainant therefore contends that the failure or unwillingness by the Respondent State to protect the Victim from mistreatment can be directly ascribed to the fact that he is not only a supporter of the main opposition party, but also a white man and therefore a victim of State sanctioned racial discrimination, contrary to the African Charter.

84. The Complainant refers to the Commission's decision in *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de L'Homme v Mauritania*, where it held that:³⁴

Article 2 of the Charter lays down a principle that is essential to the spirit of this convention; one of those goals is the elimination of all forms of discrimination and to ensure equality among all human beings.

85. The Complainant submits that the same objective underpins the Declaration of Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the United Nations in Resolution 47/135. They contend that Article 1 of the declaration stipulates the obligation of a State to protect the existence of national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories.

86. The Complainant submits that the Respondent State has disregarded this obligation, as the Victim was subjected to racial discriminatory abuses by State functionaries including the highest authority being the President of

³⁴ Communication 54/91, 61/91, 98/93, 164 – 196/97, and 210/98 - *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de L'Homme v Mauritania* para 131.





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Zimbabwe.³⁵ The Complainant refers to the Commission's decision in *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Angola*, where the Commission underscored the fact that:³⁶

A government action...directed at specific national, racial, ethnic or religious group is generally qualified as discriminatory...The Commission concedes that African States in general...are faced with many challenges, mainly economic, and in the face of such difficulties, States often resort to radical measures...whatever the circumstances may be, such measures should not be taken at the detriment of the enjoyment of human rights.

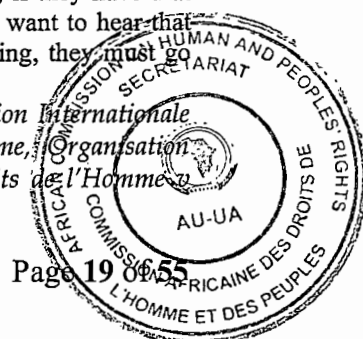
87. The Complainant submits that in the present case it cannot be argued that the expropriation of the Victim's asset was motivated by considerations other than race, as he acquired all his assets after Zimbabwe gained independence and was not a beneficiary of the historical annexation of land by the British settlers in 1891. The Complainant therefore submits that the targeting of the Victim on account of his race constitutes a violation of the spirit of Article 2 of the African Charter.

Alleged violation of Article 3 of the African Charter

88. The Complainant submits that the refusal of the Respondent State to respect court orders issued in favour of the Victim points to deliberate efforts by State agents to deny the Victim of the protection of law. The Complainant avers that the Victim pursued all available legal channels to protect his family, property and employees from the State sanctioned attack, and was granted no less than six (6) orders in his favour. The Complainant avers that these orders confirmed the Victim's right to stay on his farm, not to be assaulted, harassed or interfered with, however, these were all defied by the Respondent State with impunity.

³⁵ The Complainant indicates in its complaint that on 12 June 2003, President Mugabe delivered a speech on ZTV at Nyakomba Irrigation Scheme in Nyanga, during which he stated: "these Bennetts and the De Klerks, are not deserving cases in regards to allocation of land, because they are destabilizing our society, they are for illegality; they are supporting a party in its program of pursuing an illegal course of power. All those who are working in this illegal way, in this manner of destabilizing our society, do not deserve a portion of our land at all. If they have it, if they have that land, that land will be taken from them and given to more loyal citizens, so I don't want to hear that there is a Bennett, that there is a De Klerk who continues to destabilize our wellbeing, they must go from here."

³⁶ Communication 159/96 - *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme v Angola* paras 15 and 16.





89. The Complainant submits that the Privileges Committee of the 4th Parliament of Zimbabwe was biased towards the Victim, as majority of the members were from the Zimbabwe African National Union - Patriotic Front (ZANU-PF), and predictably failed or refused to take into account all the relevant factors in their determination. Further, the Complainant avers that the sentence imposed on the Victim failed to take into account the violations he had suffered at the hands of State agents, which led him to act in the heat of the moment and in response to severe provocation. The Complainant submits that this was noted by Justice Sandura of the Supreme Court of Zimbabwe in a dissenting opinion, which stated that the sentence was grossly disproportionate to the seriousness of the offence committed by the Victim, and was therefore unconstitutional in terms of section 15 (1) of the Constitution of the Republic of Zimbabwe, 1980 (former Constitution of Zimbabwe).
90. The Complainant refers to the decision of the Commission in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe* where it held that under Article 3 of the African Charter, equality before and equal protection of the law means equality with regard to interpretation, application and enforcement of the law.³⁷ Hence, the Complainant submits that the treatment of the Victim as outlined above was in direct violation of Article 3 of the African Charter.

Alleged violation of Articles 4 and 5 of the African Charter

91. The Complainant contends that the attacks directed at the totality of the victim's life amounted to torture, cruel, inhuman or degrading treatment. The complainant submits that the acts of torture include: the extra-judicial execution of two of his employees, the rape suffered by two young female employees, the vicious assault meted on the Victim and his employees, and the miscarriage suffered by the Victim's wife as a result of the actions of agents of ZANU-PF.
92. The Complainant avers that the Victim was arrested on 9 October 2002, in Mutare and assaulted at the police station while the Officer-in-Charge looked on.
93. The Complainant further contends that the sentence imposed by the Parliamentary Privilege Committee amounted to torture as it was disproportionate to the offence and induced a sense of shock. In support of

³⁷ Communication 293/04 - *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe*.





this argument, the Complainant refers to the decision of the Supreme Court of Zimbabwe in *S v Ndhlovu*, where it held that:³⁸

The freedom [from] torture, cruel, inhuman or degrading punishment and treatment is not confined to punishments which are in their nature inhuman or degrading. It also extends to punishments which are 'grossly disproportionate'; those which are inhuman or degrading in their disproportionality to the seriousness of the offence, in that no one could possibly have thought that the particular offence would have attracted such a penalty...

94. The Complainant argues that in applying the above principles to the facts of the present Communication, there can be no doubt that the sentence of 15 months imprisonment with labour, of which 3 months was conditionally suspended, is grossly disproportionate to the seriousness of the offence committed by the victim.
95. The Complainant submits that by imposing an effective prison sentence when other forms of punishment would have been appropriate, Parliament failed to guard against an excessive devotion to the cause of deterrence. Hence, the Complainant contends that Parliament did not give due regard to mitigating factors, as the Victim acted in the heat of the moment and in response to severe provocation. The Complainant submits that if these factors were considered, it would have greatly reduced the Victim's moral blameworthiness. It therefore submits that this omission amounts to a violation of Articles 4 and 5 of the African Charter.

Alleged violation of Articles 6 of the African Charter

96. The Complainant submits that the Victim was subjected to an unlawful and arbitrary arrest on 9 October 2002, as the charges brought against him were false. It submits that following the arrest of the Victim, his lawyers were denied access to him and threatened with violence.
97. The Complainant alleges that after suffering humiliation and abuse, the Victim and other arrested persons were eventually taken to court and accused of violating the Electoral Act by taking photographs within a hundred (100) meters of the polling station. The Complainant submits that there was no evidence to sustain the charge, hence the State never proceeded with the matter. However, the Complainant contends that the actions of the Respondent State and its failure to stop the arbitrary arrests, detentions and assault of the Victim at the hands of State agents amounted to an arbitrary deprivation of liberty and security in violation of Article 6 of the African Charter.

³⁸ *S v Ndhlovu* (1998) 2 SA 702 ZSC at 715 G - I

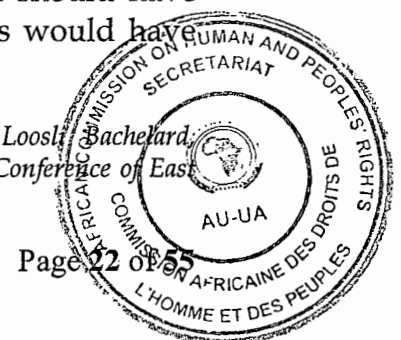




Alleged violation of Articles 7 of the African Charter

98. The Complainant submits that the proceedings conducted by the Privileges Committee of the 4th Parliament of Zimbabwe violated the Victim's right to a fair hearing by an independent and impartial court or adjudicating body as prescribed in Article 7 of the African Charter.
99. The Complainant submits that in *Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* the Commission held that all the provisions of Article 7 of the African Charter are "mutually dependent, and where the right to be heard is infringed, other violations may occur, such as detentions being rendered arbitrary. Especially sensitive is the definition of "competent", which encompasses facets such as the expertise of the judges and the inherent justice of the laws under which they operate".³⁹
100. The Complainant argues that in the present Communication, the Victim's right to have his cause heard was violated by the fact that the Privileges Committee mainly composed of members of the ruling party, ZANU PF, whilst only two members of the Committee were members of the Movement for Democratic Change (MDC), the opposition party to which the Victim belonged. The Complainant submits that as a result of this composition, the Privileges Committee was biased and retributive in their application of the law.
101. The Complainant further submits that the Respondent State may argue that when Parliament is dealing with contempt offences, it is not exercising a criminal or civil jurisdiction, rather a *sui generis* jurisdiction expressly authorised by the Constitution of Zimbabwe. The Complainant however contends that the former Constitution of Zimbabwe in so far as it permitted Parliament to be judge in its own case, is in violation of Article 7 of the African Charter.
102. The Complainant submits that the 4th Parliament of Zimbabwe imposed a criminal penalty of 12 months imprisonment with hard labour, without meeting the burden of proof necessary in criminal matters, which is proof beyond reasonable doubt. It avers that the Victim should have been tried by a competent court of law, where due process would have

³⁹ Communication 48/90-50/91-52/91-89/93 - *Amnesty International, Comite Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* para 62.





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been followed. The Complainant submits that in the 'court' of Parliament, the procedure was fundamentally different, as the Victim was convicted by a mere moving of a motion setting out the allegation, followed by a debate and a vote on the motion.

103. The Complainant argues that Parliament was supposed to exercise its jurisdiction in a manner that is not inconsistent with or offensive to the African Charter. It submits that the Speaker of the Parliament should have made it clear to Members that they were sitting as a court of record and as such obligated to decide the matter taking into consideration the Victim's rights. The Complainant submits that this omission resulted in Members voting along party lines in violation of Article 7 African Charter.

104. The Complainant further alleges that the arbitrariness of the hearing and sentence imposed on the Victim is evident in the fact that the Privileges Committee failed to present its findings at the conclusion of the 4th Session of the 4th Parliament. Rather, the Privileges Committee presented its report to the 5th Session of Parliament, despite the rules of Parliament that the business of a Session cannot be revived in the next Session unless it has been officially resuscitated in a new session. The Complainant submits that this is another indication that the proceedings were retributive in nature and were not meant to advance the cause of justice.

Alleged violation of Articles 10, 11 and 13 of the African Charter

105. The Complainant submits that the Victim was targeted for his support for the opposition party. It avers that the President of Zimbabwe boldly declared that the Victim should be run off his land as he was disloyal due to his support for the MDC. The Complainant submits that after the infamous speech, operatives from the Central Intelligence Organization arrived at Delpport Farm, which the Victim was leasing, and threatened to kill anyone who worked for the Victim.

106. The Complainant submits that fearing a repeat of the March 2004 violence, the farm labourers fled, and the assailants proceeded to loot the farm. The Complainant alleges that the Victim immediately informed the police, who had initially stated that they were unable to act, as the matter was "political", but eventually two police officers escorted the Victim to the farm, but were prevented from entering the farm by the youth brigade.

107. The Complainant submits that the Victim was punished for his support for the opposition party and labelled disloyal in violation of Articles 10, 11 and 13 of the African Charter which guarantees the rights to free





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association and assembly, as well as the right to participate freely in the government of the country. The Complainant refers to paragraph 3 of Resolution ACHPR/Res. 5 (XI) 92 on the Right to Freedom of Association and submits that, while acknowledging the rights and duty of the State to regulate the exercise of the rights to freedom of expression and association, such rights, under the African Charter, can only be restricted on the basis of public interest as enshrined in Article 27(2) of the African Charter. As such, targeting the Victim simply on the basis of his skin colour does not fall within the acceptable derogations of the freedoms set out in Articles 10 (1), 11 and 13 of the African Charter.

Alleged violation of Article 14 of the African Charter

108. The Complainant contends that the confiscation and looting of the Victim's property constitutes a violation of the right to property as guaranteed in Article 14 of the African Charter.
109. The Complainant submits that the Victim was born in Rusape, Zimbabwe, attended an agricultural college and worked as a farm manager before purchasing his own farm land through Standard Chartered Bank in 1983. The Complainant avers that the Victim borrowed further funds with which he purchased four more farm lands in Karoi area, Zimbabwe. However, the Victim was uncomfortable with the insular attitude of other white farmers on surrounding farm, and decided to move to Chimanimani, eastern Zimbabwe, where he announced his arrival to the traditional leaders and various traditional ceremonies were held before he was granted the approval to proceed with his project.
110. The Complainant submits that he was issued a "certificate of no present interest" to purchase his farm - Charleswood Estate, which he transformed into a highly productive entity, growing coffee on 310 hectares and a herd of 880 cattle. The Complainant further avers that the Victim entered into a partnership with an international company to process and export coffee, and registered the estate as an Export Processing Zone protecting it from compulsory acquisition by the government.
111. The Complainant submits that the right to property is a fundamental right in democratic society. The Complainant avers that the acquisition of the Victim's farm amounted to an act of expropriation. It submits that under international law, the following minimum standard must be complied with for an act of expropriation to be lawful: it ought to be non-discriminatory, for a public purpose and accompanied by prompt, adequate and effective compensation.





112. In support of the above position, the Complainant referred to the decision of the Commission in *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan* where it held that "The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property."⁴⁰
113. The Complainant submits that Charleswood Estate has been acquired by the Respondent State and is being operated by the Agricultural and Rural Development Authority. However, no compensation has been paid to the Victim. The Complainant therefore argues that where a State exercises its eminent domain and acquires an individual's property, adequate and effective compensation must be paid, failing which the act of expropriation is illegal. In support of this argument the Complainant referred to the decision of the international Court of Justice in the matter between *Germany v Poland* (The Factory at Chorzow case).⁴¹
114. The Complainant therefore submits that by flouting court orders, and mounting a campaign to pursue the Victim from his estate, without due compensation, the Respondent State violated its obligation as prescribed in Article 14 of the African Charter.

Alleged violation of Article 18 of the African Charter

115. The Complainant submits that Article 18 (3) of the African Charter enjoins States to ensure the elimination of every form of discrimination against women and ensure the protection of women and children. This obligation the Complainant contends the Respondent State has failed to uphold.
116. The Complainant states that in May 2000, after the Victim had announced his candidacy for MDC, ZANU PF supporters invaded his estate forcing the staff to abandon the farm. The Complainant avers that the Victim's pregnant wife was held hostage in the rain and threatened with a machete held against her throat, after she tried to stop the invaders from beating a farm worker with wooden clubs. The Complainant submits that this resulted in a miscarriage. It further states that the invasion lasted three weeks, during which time farm workers were assaulted, vehicles

⁴⁰ Communication 279/03-296/05 - *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan* para 193.

⁴¹ *Factory at Chorzow* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13)





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maliciously damaged, stock slaughtered and equipment and personal belongings stolen from the Victim's home.

117. The Complainant argues that where human rights violations are perpetuated by private actors, the State can be held responsible at an international level, not because of the act itself, but due to the failure to exercise due diligence to prevent the violation or respond to it as required by the African Charter. The Complainant contends that present Communication, the consistent failure of the Respondent State to enforce the court orders which would have guaranteed the Victim and his family peaceful, and undisturbed enjoyment of their property, amounts to a violation of Article 18 of the African Charter.

Alleged violation of Article 1 of the African Charter

118. The Complainant submits that Article 1 of the African Charter mandates States to recognize the rights, duties and freedoms enshrined therein and to adopt legislative measures to give effect to them. The Complainant refers to the decision of the Commission in *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* where it held that:⁴²

The respect for the rights imposes on the State the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the State to guarantee that private individuals do not violate these rights.

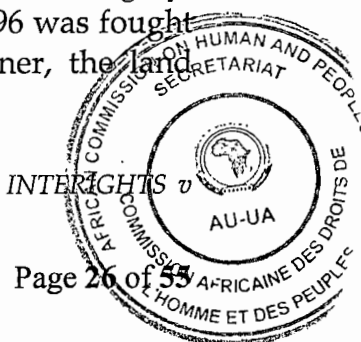
119. In this context, the Complainant contends that the failure of the Respondent State to protect the Victim, his family and his employees from the malevolence of State actors, youth militia and ruling party supporters amounts to a violation of Article 1 of the African Charter.

Respondent State's submissions on the Merits

Alleged violation of Article 2 of the African Charter

120. The Respondent State submits that to understand issues surrounding the events between the periods of 2000 to 2005, it is necessary to delve into the historical background of Zimbabwe. In this regard the Respondent State submits that land was one of the major reasons for waging war against the colonial powers and those who sought to perpetuate its legacy. It submits that the first Chimurenga (uprising) in 1893 to 1896 was fought to restore land seized from blacks in 1890, in same manner, the land

⁴² Communication 272/03 - *Association of Victims of Post Electoral Violence & INTERIGHTS v Cameroon* para 88.





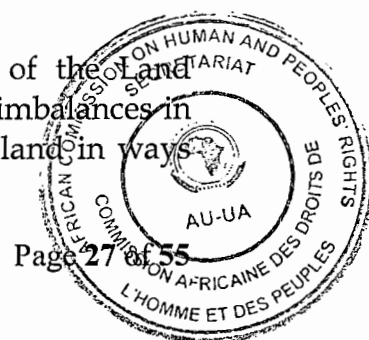
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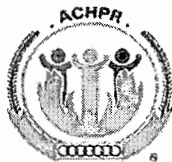
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question led to the War of Liberation (second Chimurenga) which ended with the Lancaster House Agreement in 1979.

121. The Respondent State submits that the colonial government had put in place policies that favoured the white commercial farmers, as they could access trainings, direct grants, loan guarantee schemes, funding for agricultural research and building of roads. The State submits that as a result of this policy, many whites bought farmlands in areas reserved for the white population, which tended to be upland areas where rainfall was higher and the soil fertile.
122. The Respondent State argues that it was against this background that various laws on acquisition of land were enacted by the government of Zimbabwe in the interest of economic development, racial harmony, peace, security and political stability among other things.
123. The Respondent State submits that the Draft Constitution contained provisions relating to the acquisition of land for resettlement and placed the onus for providing compensation for the acquired farms on the former colonial power. The government of Zimbabwe would pay for infrastructural improvements on the land but not for the land itself.
124. The Respondent State submits that the impatience of the landless masses reached boiling point in 2000, resulting in invasions which coincided with the rejection of the then Draft Constitution. It states that the invasions were never a policy nor were they an integral part of the Land Reform and Resettlement Programme, but were a spontaneous reaction by the landless people. The Respondent State avers that war veterans who had sacrificed their youth and future prospects to go to war over the land question were disappointed by the apparent setback and took it upon themselves to demonstrate.
125. The Respondent State condemns the actions of these actors and states that there was never a directive from the State advising the police not to attend to complaints or respond to incidents of crime on account of their being 'political'. It avers that the invasions happened spontaneously and were country wide, as such, the police were overwhelmed. The State submits that these constraints faced by the Police led to the Complainant facing the treatment complained of in the present Communication.
126. The Respondent State submits that the primary goal of the Land Reform and Resettlement Programme is to redress colonial imbalances in access to ownership, control and utilization of agricultural land in ways

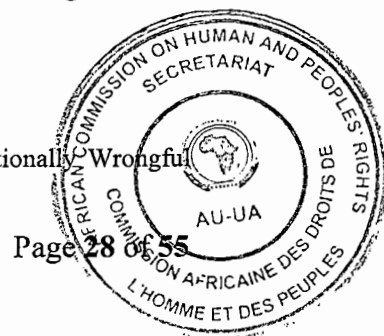




that avail production and development opportunities to the previously disadvantaged black population.

127. The Respondent State submits that at the initial stage of the process, the government laid down a framework under which farms once gazetted for acquisition could be de-listed for valid reasons, for example, if the farms were plantations, farms in the large-scale production of tea, coffee, timber, citrus, sugar cane etc. Also included were farms in Export Processing Zones. The Respondent State avers that during this period almost all the farmers whose land had been targeted for acquisition instituted legal proceedings. It was therefore during the same period that the complainant obtained the court orders setting aside the government notices of intention to acquire, and confirmed his right to remain at Charleswood Estate.
128. The Respondent State avers that these challenges slowed down the acquisition and resettlement process to a snail pace, as court processes were blocking meaningful progress in the Land Reform and Resettlement Programme. It therefore became necessary to promulgate a law that promoted the goals and purposes of land reform in the country. The Respondent State submits that the Constitutional Amendment (No 17) Act of 2005 was enacted to meet this need, as it provided for compulsory acquisition of agricultural land without recourse to the courts, save for issues of compensation for improvements.
129. The Respondent State contends that the Constitutional Amendment had the effect of nullifying all court orders which had set aside government notices of intention to acquire. The State therefore submits that although the initial policy excluded farms belonging to foreign nationals who were protected by Bilateral Agreements and under the Export Processing Zone, this policy could not be maintained due to the fact that the number of people in need of land had not been satisfied and in some cases had increased. The Respondent State therefore contends that the compulsory acquisition was not discriminatory.
130. Further, the Respondent State refers to the incident of rape alluded to by the Complainant and states that the rape was never encouraged or sanctioned by the government. It refers to Article 8 of the International Law Articles on Responsibility of States for Internationally Wrongful Acts which stipulates that:⁴³

⁴³ International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, November 2001 Supplement No. 10 (A/56/10) ILC art 8.





The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.

131. Referencing the above provision, the Respondent State contends that for the conduct of a person or group of persons who are not officially "organs" of the State, to be attributable to the State, the person or group of persons must be acting on the instructions or under the direction or control of the State in carrying out the conduct. It submits that there should be evidence that such people were actually authorised and recruited by the State to do so for the attribution to be accepted in international law, which is not the case in the present Communication.

Alleged violation of Article 3 (1) and (2) of the African Charter

132. The Respondent State submits that the Constitution of Zimbabwe recognizes equal protection before the law for every individual. This it avers was clearly demonstrated by the fact that the Victim was able to approach the Courts of the Respondent State and obtained the various court orders which were in his favour. The Respondent State contends that it was incumbent on the Victim to pursue the enforcement of the said court orders, and that he has not raised any allegation of obstruction of justice in his attempt to enforce same.
133. The Respondent State contends that within its jurisdiction, it is never a duty of the State to enforce court orders in civil proceedings but rather the duty of the individual, in whose favour the order is made, through the Deputy Sheriff. Where the Deputy Sheriff faces resistance, he can then enlist the services of the Police only for the purpose of providing security coverage, and not the physical execution of the order. The Respondent State further contends that when the State agents refused to respect the said orders as alleged, the Victim ought to have approached the courts for remedy in the form of contempt of court proceedings, given the circumstances.
134. The Respondent State denies all allegations of bias raised by the Complainant, as it pertains to the proceedings of the Privileges Committee of the 4th Parliament of Zimbabwe. It avers that the Committee was composed of three (3) members from ZANU PF and two (2) members from the MDC, which was proportional, taking into consideration the Parliamentary representation at the relevant time. The Respondent State argues that the complainant before the Committee was the Parliament and not ZANU (PF). On this basis, the Respondent State submits that members of Parliament belonging to ZANU PF party were competent to adjudicate upon a matter of contempt of Parliament by the Victim. This it avers was the position of the





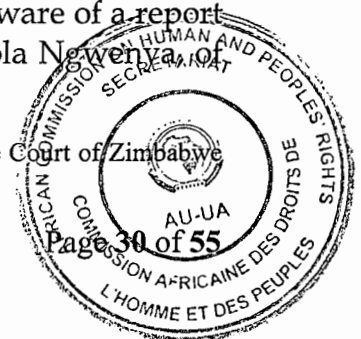
Supreme Court of Zimbabwe in *Roy Leslie Bennett v Emmerson Dambudo Mnangagwa and 6 others*, wherein the court noted that Parliament is separate and distinct entity from ZANU PF.⁴⁴

135. The Respondent State submits that in determining the appropriate sentence, the Privileges Committee struck a proper balance between the aggravating and mitigating factors. It submits that pursuant to section 21 of the Privileges, Immunities and Powers of Parliament Act, Parliament may either impose a level seven (7) fine or imprisonment up to two (2) years, and in accordance with sections 16(1) and 3 of the Act, impose any penalty which was not inconsistent with sentences which the House of Commons of the Parliament of the United Kingdom could impose on 18 April 1980.
136. The Respondent State submits that in considering the appropriate punishment, the majority of the members of the Committee felt that: the Victim's conduct was the worst attack on the dignity of Parliament in the history of Zimbabwe; assaulting another Member of Parliament, worse still a Cabinet Minister, who is also Leader of the House, could not be tolerated and Parliament has to express its displeasure by imposing a deterrent sentence; the speech by the Honourable Member cannot be said to have provoked the Victim as to morally justify his conduct on that particular day; and that whatever happened on the Victim's farms (if it is true) cannot be used as justification for the morally reprehensible conduct he displayed towards the Honourable Member and Parliament itself.
137. The Respondent submits that the majority voted for the punishment imposed while the minority thought a much more lenient punishment was appropriate in the circumstances. It therefore submits that the issue of whether the aggravating features as weighed against the mitigating features, justified the harsh punishment recommended by the majority members of the Committee or should have led to the imposition of the overly lenient punishment recommended by the minority members of the Committee is, to a large extent, a matter of value judgment.

Alleged violation of Article 4 and 5 of the African Charter

138. The Respondent State submits that the Complainant has not provided any particulars of the persons allegedly murdered and raped, as such the Respondent had difficulties in establishing the full facts in responding to the Communication. The Respondent State submits that it is only aware of a report of rape received in March 2004 in respect of a complainant Viola Ngwenya, of

⁴⁴ *Roy Leslie Bennett v Emmerson Dambudo Mnangagwa and 6 others*, Supreme Court of Zimbabwe No. 75 of 2005





Charleswood farm, Chimanimani previously owned by the Victim. The Respondent State avers that Viola Ngwenya had alleged that she was raped at the farm by one Chamunorwa Muusha, and the matter was investigated by the police under the Criminal Investigations Department, Mutare and the crime docket referred to the Attorney General's Office for consideration.

139. In respect of the alleged cases of murder, the Respondent State submits that it is only aware of the murder of Shanie Manyenyekwa of the same farm. It submits that the police are yet to finalise the investigations hence, the alleged case of murder is still pending. The Respondent State avers that progress in bringing these cases to finality is impeded by the fact that both the accused and witnesses, including the Victim could not be located.

140. With regards to the miscarriage suffered by the Victim's wife through the alleged actions of ZANU PF supporters, the Respondent State denies any knowledge of such incident, and contends that had it been furnished with comprehensive facts pertaining to the incident, the State would have been investigated, and would have been in a better position to respond to the allegations raised.

141. The Respondent State submits that the perpetrators were clearly not State agents, as the weapons allegedly used i.e., machetes and wooden clubs, are a clear indication that they were not State agents. Therefore, it contends that since the violations complained of were not sanctioned by the State but were actions of opportunistic criminals who took advantage of the situation, liability can thus not be attributed to the State.

Alleged violation of Article 6 of the African Charter

142. The Respondent State denies all allegations by the Complainant as it relates to the alleged unlawful and arbitrarily arrest of the Victim on 9 October 2002, and the subsequent denial of access to legal representation.

143. The Respondent State contends that the Victim was arrested on reasonable suspicion of having committed an offence in contravention of the Electoral Act. The Respondent State submits that the charges were withdrawn due to lack of sufficient evidence to establish a *prima-facie* case. It however submits that the fact that these charges were withdrawn is clear indication that due process of law was followed and the Victim was afforded the protection of the law.

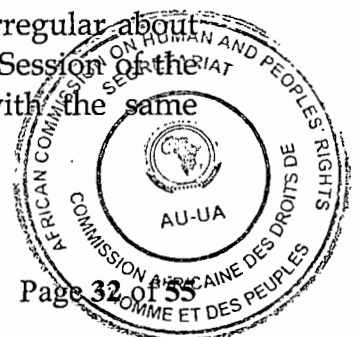
Alleged violation of Article 7 of the African Charter





144. The Respondent State contends that the submissions by the Complainant as it pertains to Article 7 of the African Charter are not merited for one or more of the following reasons: a) The Victim was charged with contempt of Parliament and not contempt of ZANU PF, and in any event the complainant in the Victim's case was not ZANU PF but Parliament; b) Parliament is a separate and distinct entity from ZANU PF; c) If the Victim's argument is to be accepted, then members of his own party could not have adjudicated, as based on the Complainant's argument they would be considered committers of the contempt.
145. The Respondent State submits that in a long line of Zimbabwean Supreme Court cases, it has been held that a finding of guilt by Parliament on contempt offence is not a crime in the conventional sense. When dealing with these contempt offences, Parliament though sitting as a court, does not sit as a court of laws. It exercises its own jurisdiction and powers conferred upon it by the Privileges, Immunities and Powers of Parliament Act. The Respondent therefore contends that any failure by Parliament, when sitting as court to adhere to certain procedures followed in a court of law does not necessarily mean that such hearing is not fair or impartial.
146. The Respondent State refers to the Supreme Court case of *Mutasa v Makombe* wherein it was stated that:⁴⁵
In the court of Parliament, the procedure is fundamentally and totally different. In the court of Parliament due process is satisfied by the mere moving of a motion setting out the allegation, debate and voting on the motion. At the end of the debate the question of a verdict and punishment is determined by a majority vote of the Members of Parliament. More often than not, either by design or otherwise, the vote to determine the outcome of any debate is along party or partisan lines.
147. The Respondent State contends that the Complainant's argument of arbitrariness on the basis that the Privileges Committee failed to present its findings at the 4th Session of Parliament and only presented its report to the 5th session of Parliament in contravention of the rules, have not been substantiated. The Respondent avers that the Complainant erroneously relied on Standing Order No 159 to contend that there was need to officially resuscitate the issue in the next session, as the Order relates to Portfolio Committees and as such bears no relevance to the Complainant's argument.
148. The Respondent State submits that there was nothing irregular about the Privileges Committee presenting its findings to the 5th Session of the same Parliament, as it was still the same Parliament with the same

⁴⁵ *Mutasa v Makombe* 1998 (1) SA 397 (ZSC) at 402 E-G





membership. The Respondent State contends that the situation would have been different had Parliament been dissolved, as this would have been done in terms of section 63 of the former Constitution of Zimbabwe which provides that on dissolution of Parliament, all proceedings pending at the time shall be terminated and accordingly every bill, motion, petition or other business shall lapse.

Alleged violation of Article 10, 11 and 13 of the African Charter

149. The Respondent State denies that the Victim was targeted as alleged. It contends that during the period in issue there was a revolution and landless people were occupying farms at their own instance as previously alluded to. Thus, the Victim's farm was not targeted for his being a member of MDC, as all other farms were being occupied including land belonging to indigenous Zimbabweans. The Respondent State therefore contends that the actions of the occupiers cannot be imputed on the State.

Alleged violation of Article 14 of the African Charter

150. The Respondent submits that although Article 14 of the African Charter guarantees the right to property, it must be noted that this right may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of the laws.

151. The Respondent State asserts that the expropriation was in accordance with the laws of the State and was in the public interest due to the need for a land reform. It contends that the objective of the land reform and resettlement programme was to create political stability and an acceptable property rights regime, to promote economic growth through wider equity and efficiency gains from land redistribution.

152. The Respondent therefore submits that public purpose is considered by international law to be of such overriding importance that it is allowed to derogate from the principle of respect of private rights. As such, the Respondent State contends that the expropriation was for a public purpose which overrides the interests of the individual.

Alleged violation of Article 18 of the African Charter

153. The Respondent State denies the Complainant's assertion that the State is liable for action of non-State actors who invaded the Victim's farmland and held his wife hostage.





154. The Respondent State submits that when one considers the kind of weapons allegedly used, it is clear that the attackers were not state agents, and neither does the Complainant claim that these were State agents, therefore their action should not be imputed to the Respondent State. It further contends that the Communication does not contain any evidence that the Victim reported the incident to the police who had failed to take action.

155. In view of the foregoing, the Respondent State submits that the Communication is devoid of merits.

Complainant's reply to the Respondent State's submission on the Merits

Alleged violation of Article 2 of the African Charter

156. In response to the Respondent State's submission, the Complainant contends that the injustices underpinning the struggle against colonialism are not at issue in the present Communication. The Complainant submits that it has neither alleged nor inferred that the land reform program in its entirety was ill founded or unnecessary.

157. The Complainant restates that the Victim was not a beneficiary of the appropriation of land by the colonialists, having bought his first farm after independence in 1983 through a loan obtained from Standard Chartered Bank (referred to as Stanbic Bank). The Complainant submits that the Victim enjoyed the blessings of the people of Chimanimani, who named him "Pachedu" indicating his oneness with the local community.

158. The Complainant further avers that the fact that the Respondent State was attempting to correct historical wrongs does not exempt it from paying compensation to the Victim, as the critical question is the effect of a government's act, not its subjective intention.

159. The Complainant submits that it is disingenuous for the Respondent State to dismiss the rape of the Victim's employees as 'shear lawlessness by some opportunist'. The Complainant contends that while these crimes may not have been perpetrated by a government official acting in his/her capacity as such, the failure of the Respondent State to investigate, arrest and prosecute these perpetrators amounts to complicity in the commission of the crimes.

Alleged violation of Article 3 (1) and (2) of the African Charter





160. The Complainant maintains that the Victim was not afforded a fair hearing and that the sentence imposed by the 4th Parliament of Zimbabwe was grossly disproportionate to the offence committed. It contends that imposing a term of 12 months imprisonment with hard labour for an incident that could arguably be labelled a petty squabble between political rivals, is clearly unbalanced.

161. Further, the Complainant submits that the Respondent State's assertion that the actions of Parliament are beyond reproach because they conformed to the constitutional dispensation prevailing in Zimbabwe at the time is misguided, as it is trite law that domestic provisions cannot be invoked to justify non-compliance with treaty obligations.

Alleged violation of Article 4, 5, 6 of the African Charter

162. The Complainant contends that the Respondent State has a duty to investigate all allegations of crimes committed within its territory, which it has failed to do in this case and in the few instances it had done so, by its own admission, there have been no prosecutions conducted by the Prosecutor General.

163. The Complainant notes that the Respondent State refers to the withdrawal of charges as a cure for the Victim's denial of legal representation. It submits that in General Comment 32, the United Nations Human Rights Committee noted that "the right to communicate with counsel requires that the accused is granted prompt access to counsel."⁴⁶ Thus, Complainant argues that the fact that no charges were filed does not mean that the Complainant's rights were not violated.

Alleged violation of Article 10, 11, 13, 14 and 18 of the African Charter

164. The Complainant maintains that the Victim was not a beneficiary of the colonial power structure, and his farm was considered an integral part of the socio-economic life of the people of Chimanimani. Therefore the Complainant contends that the Respondent cannot hide behind historical injustices to avoid its responsibilities to the Victim.

The Commission's analysis on the Merits

⁴⁶ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32.





Alleged violation of Article 2 of the African Charter

165. Article 2 of the African Charter provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

166. The Complainant specifically argues that the Victim's rights with respect to Article 2 of the African Charter has been violated on the basis of race, colour, and political opinion. As proof of this allegation, reference is made to a speech aired on ZTV, delivered by the former President Mugabe at the Nyakomba Irrigation Scheme in Nyanga, in which the Victim's property was specifically mentioned for seizure. The Complainant further argues that the Victim was made to suffer the acts enumerated in paragraphs 7 to 11 above, jointly because of his racial identity, as well as his political affiliation.

167. In response to this allegation the Respondent State gave a narrative of the inequitable distribution of land whereby the black population in Zimbabwe were disadvantaged in favour of the whites, necessitating the establishment of a new land policy, to allow for the acquisition of land from those who had it (predominantly white), and restore to those who were historically disadvantaged (predominantly black).

168. The Respondent State argues that the seizure of the Victim's farm was not discriminatory, but a lawful action carried out on the basis of Constitutional Amendment (No. 17) Act of 2005. The Respondent State dissociates itself from the actions of those who allegedly invaded the Victim's farm land and assaulted his wife and employees, and submits that the Invasions were never a policy but a spontaneous reaction from landless people. It avers that this was as a result of the draft Constitution rejection demonstrations which were not instructed, directed or controlled by the State nor were the acts perpetuated condoned by it.

169. In *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on Behalf of Andrew Barclay Meldrum) v. Zimbabwe*, the Commission defined discrimination as:⁴⁷

...any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status, and which has the

⁴⁷ Communication 294/04 - *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on Behalf of Andrew Barclay Meldrum) v. Zimbabwe* para 91.

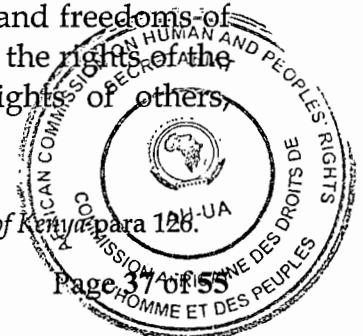




purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.

170. The Commission further developed the above jurisprudence in the case of *The Nubian Community in Kenya v The Republic of Kenya* where it held that differential treatment alone, is not sufficient to establish an allegation of discrimination. The differential treatment of individuals similarly placed, is permitted where such treatment is meant to achieve a rational and legitimate purpose that does not impair the fundamental dignity of the affected persons or unjustifiably infringes on their enjoyment of the rights and freedoms guaranteed under the Charter.⁴⁸ Hence, the Commission must determine whether the expropriation of the Victim's property was executed in furtherance of a legitimate purpose.
171. Since the independence of the Republic of Zimbabwe in 1980, the issue of land reform, in particular land acquisition and redistribution remains a controversial matter. The Commission notes the Respondent State's submission that the State established a framework for the redistribution of the land, and those farmers, including the Victim whose lands were targeted for acquisition instituted legal proceedings. The Respondent maintained that it became necessary to promulgate a law that promoted the goals and purposes of land reform in Zimbabwe, a historical mandate. The Constitutional Amendment (No. 17) Act of 2005 was enacted to meet this need.
172. The Commission notes that pursuant to section 16B (2) of the Constitutional Amendment (No. 17) Act and section 5 (1) of the Land Acquisition (Amendment) Act 2002 (Land Acquisition Act) the President or any Minister duly authorised by the President for that purpose may cause to be published in the Government Gazette a preliminary notice of the intention of the State to compulsorily acquire any land in the interest of public safety, order, morality, health, town and country planning or the utilization of that or any property for a purpose beneficial to the public generally or any section of the public.
173. Where the issue of limitation of rights is raised in a Communication, the Commission has held in *Constitutional Rights Project and Others v Nigeria* that "the only legitimate reasons for limitations of rights and freedoms of the African Charter are found in Article 27 (2), that is, that the rights of the Charter shall be exercised with due regard to the rights of others,

⁴⁸ Communication 317/2006 - *The Nubian Community in Kenya v The Republic of Kenya* para 126.



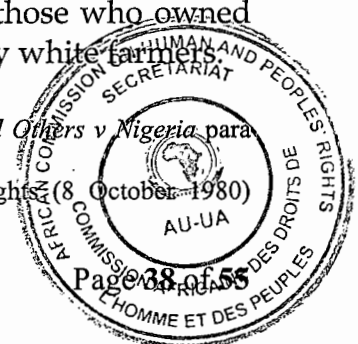


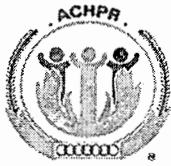
collective security, morality and common interest."⁴⁹ The Commission noted further that the justification for the limitation must be strictly proportionate with and absolutely necessary for the advantages which follow.

174. The Commission notes the Respondent State's contention that the Victim's property was compulsorily acquired in furtherance of its objectives under the Land Reform and Resettlement Programme, to redress the inequitable distribution of land, access to ownership, control and utilization of agricultural lands in favour of the previously disadvantage black population. In contrast, the Complainant contends that Charleswood Estate, the disputed land was acquired via a lawful purchase of land in the post-colonial era, as such the acquisition is at odds with the legitimate purpose of restoring land to historically oppressed populations.
175. The Commission finds that despite the Complainant's assertion that the Victim purchased Charleswood Estate directly from the local community at Chimanimani, eastern Zimbabwe, and hence was not a beneficiary of the historical annexation of land by the British settlers; it must also be recognised that States are indeed entitled, *inter alia*, to compulsorily acquire and control the use of property in accordance with the legitimate reasons prescribed in Article 27 (2), and by enforcing such laws as they deem necessary for the given purpose.⁵⁰ As such, the State in interfering with the Victim's right to peaceful ownership and control of the property was obligated to comply with the principle of lawfulness, and pursue a legitimate aim.
176. In light of the foregoing, it is the Commission's view that the policy of the Respondent State to expropriate lands for its Land Reform and Resettlement Programme was not discriminatory, as the intention was to address historical imbalances, to serve a public interest, and the redistribution provided for by law. The Respondent State embarked on a legitimate process of land reform and resettlement, and part of this process involved the expropriation of not only the property of the Victim, but a lot of other owners whose farms had been identified for expropriation. As such, the Commission does not find that the Victim was targeted because of his race, or that the State authorized the perpetrators of the crimes committed on his property. In terms of proportionality, the Commission notes that the reform policy affected only those who owned vast portions of land, who happened to be predominantly white farmers.

⁴⁹ Communication 140/94, 141/94, 145/95 – *Constitutional Rights Project and Others v Nigeria* para 41.

⁵⁰ *Sporrong and Lonnroth v Sweden* European Commission of Human Rights (8 October 1980) Application 7151/75; 7152/75.





177. The Commission notes the Respondent State's submission that there was provision for compensation even though the State was only willing to provide limited compensation for the land. Therefore, the Commission considers that the Victim's contention as to the nature of ownership of the property is a misplaced argument, as this speaks to the issue of 'payment of fair compensation'. This issue is considered extensively under Article 14 of the Commission's decision below.

178. The Commission however notes that the manner in which the Victim's land was seized and the context in which the property was acquire raises issues. The acquisition was not effected in accordance with the policy and laws of the Respondent State, but rather taken in a forceful way with violence inflicted on the Victim, his family and his employees in breach of legal procedures. The Commission considers that even though the perpetrators who invaded the Victim's land were not acting in pursuance of the government's policy, the fact that their actions were linked to the President's speech in which he singled out the Victim predominantly for his political views and not necessarily based on his race, made him vulnerable and exposed him to the violations he faced which were incited by the speech. This therefore constitutes discrimination and violates Article 2 of the African Charter.

Alleged violation of Article 3 of the African Charter

179. Article 3 (1) and (2) of the African Charter provides:

- (1) Every individual shall be equal before the law;
- (2) Every individual shall be entitled to equal protection of the law.

180. In *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe* the Commission held that:⁵¹

The right to equality before the law means that individuals legally within the jurisdiction of a State should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions... [Hence,] factual patterns that are objectively equal must be treated equally.

181. The Commission further held that equal protection of the law relates to the right of all persons to have the same access to the law and courts and

⁵¹ Communication 294/04 – *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe* paras. 96-99.





to be treated equally by the law and courts both in procedures and in the substance of the law.⁵²

182. The Complainant's arguments as presented under Articles 2 and 3 above are innately linked. At issue, therefore is the question of whether the Victim has been treated unequally. It is trite law that 'he who asserts must prove', except in instances where there exist facts especially within the knowledge of the Respondent. The Complainant, therefore, must show that the Victim has been treated differently in the application of the law, or in the degree of access he was afforded to in his recourse to the law. It is not disputed that the Victim successfully took his case before the legal system of the Respondent State and obtained court orders affirming his right to remain on Charleswood estate. The issue however is the Complainant's contention that despite the constitutional protection and orders from the court, the Victim still suffered multiple violations on his person, family and property.

183. The Commission has held in *Zimbabwe Human Rights NGO Forum v Zimbabwe* that human rights law imposes a positive obligation on States to prevent and sanction private violations of human rights.⁵³ As such, an act by a private individual can trigger State responsibility, not because of the act itself, but because of the lack of due diligence to prevent the violation or adopt necessary steps to provide reparation to the victims.⁵⁴ This standard of 'due diligence' encompasses an obligation to marshal the full apparatus of the State to prevent, investigate, punish and compensate where a violation has occurred.⁵⁵ Hence, State responsibility may arise under the due diligence standard for inaction or inadequate action in a range of situations, particularly failure to provide police protection to prevent private violence, failure to investigate or investigate adequately killings by private actors, and failure to punish such perpetrators.⁵⁶

184. The Commission notes the submission of the Respondent State in paragraph 139 above, that investigations into the allegations raised by the Complainant is still pending, as sufficient information has not been received from the Victim, his witnesses or even the accused, as they cannot be located. The Respondent State has however failed to furnish any information on the efforts or measures taken to obtain the necessary

⁵² Communication 293/04 – *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* para 124.

⁵³ Communication 245/02 – *Zimbabwe Human Rights NGO Forum v Zimbabwe* para 143.

⁵⁴ As above.

⁵⁵ S Farrior and B Clagett 'State Responsibility for human rights abuses by non-State actors' (1998) 92 *American Society of International Law* 299 at 302.

⁵⁶ As above.





evidence from the Victim and his witnesses. There were also no details of the attempts made by the State to contact the Victim and his witnesses, whose identities are known to the authorities.

185. The Commission is mindful that the acts complained of by the Victim occurred in a period where it is apparent that there was a breakdown of law and order, as landless individuals forcibly invaded farms including the property of the Victim. The facts disclose that at one incident, the police did come to the aid of the Victim but they were overpowered by the invaders. The State in the circumstances could not prevent the crimes from occurring at the time, given the context in which they happened. However, The Respondent State was under a duty when reports were made by the Victim, to investigate and try perpetrators accused of the criminal acts, whether or not they were connected to the State and accordingly punish these perpetrators if found guilty. The Respondent State's failure to do so, particularly in relation to the assault on the Victim, and violence meted against his wife, which led to the miscarriage of their unborn child, amounts to a violation of Article 3 of the African Charter.
186. The Complainant further alleges that the decision of the Privileges Committee of the 4th Parliament was biased, as majority of its member were from ZANU PF, and that the outcome of this allegedly biased hearing was a disproportionate sentence which was discriminatory in nature. In response, the Respondent State contends that the charge of contempt of Parliament was properly adjudicated on and an appropriate sentence imposed.
187. The Commission notes that section 16 read in conjunction with section 21 of the Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] (Privileges Act) provides for the jurisdiction of Parliament to address contempt and mete out punishment which may include a term of imprisonment. Where a Member of Parliament is charged with contempt of Parliament, pursuant to section 16 (4), Parliament sitting as a court of record shall summarily inquire into and punish the alleged offender. Hence, the Privileges Committee was mandated to conduct an enquiry and make recommendations to Parliament in accordance with the Privileges Act, on whether or not the conduct of the Victim amounted to contempt of Parliament.
188. The Commission notes that the Complainant did not adduce any evidence to show that the Privileges Committee failed to follow objective criteria in reaching its findings against the Victim. The mere fact that the Privileges Committee constituted of a majority of ZANU PF members cannot be sufficient grounds to hold that the Victim was not afforded





equal protection under the law, as being Parliamentarians, their membership was on a partisan basis. The Commission considers that insofar as the same set of laws were applied to the Victim's case as would have been applied to any other Parliamentarian, the Complainant's argument in this respect cannot stand. It is the Commission's view that based on the submissions of both parties, due process within the context of the Privileges Committee was followed, which resulted in Parliament finding the Victim guilty of contempt and imposed a punishment of imprisonment provided by law. The Commission therefore does not find a violation of Article 3 in this regard.

189. Other facets of the facts in issue as it relates to the right to a fair hearing is further considered below, under the Commission's analysis of Article 7 of the African Charter.

Alleged violation of Article 4 and 5 of the African Charter

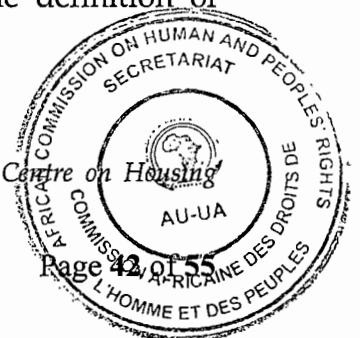
190. Article 4 of the African Charter enshrines the right to life, and Article 5 provides thus:

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

191. The Complainant submits that the attacks directed at the Victim's life amounted to torture, as they include: the extra-judicial killing of two of his employees, the rape of two female employees and the miscarriage suffered by his wife as a result of the invasion. The Respondent State does not contest the factual accuracy of the Complainant's version of events. Instead, it argues that it was not aware of all the allegations raised by the Complainant and where it was aware, it investigated or had been impeded in its attempt to investigate by the absence of key witnesses, including the Victim.

192. Article 5 of the African Charter is aimed at the protection of both human dignity and the physical and mental integrity of the individual.⁵⁷ In *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan*, the Commission adopted the definition of

⁵⁷ Communication 279/03-296/05 – *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v Sudan* para 155.





torture contained in Article 1 of the United Nations (UN) Convention Against Torture which states:⁵⁸

[T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

193. As indicated in the definition above, to qualify as torture or other cruel, inhuman or degrading treatment, the pain or suffering must be inflicted at the instigation, or with the consent or acquiescence of a public official or anyone acting in an official capacity. In interpreting Article 1 of the UNCAT the Commission in *Zimbabwe Human Rights NGO Forum v Zimbabwe* referred to the UN Fact Sheet No. 11 on Extrajudicial, Summary and Arbitrary Executions and found that situations of extrajudicial executions or torture are caused by the State or through its agents or acquiescence.⁵⁹

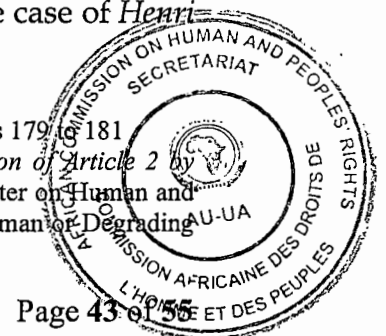
194. In the present Communication, the Complainant alleges that the crimes committed against the Victim, his wife and employees were acts of agents of ZANU PF – non-State actors. The Commission finds that from the Complainant's own admission, State organs were never responsible for the violations alleged. While States are not generally responsible for acts beyond their control, they can be held accountable for acts of torture or ill-treatment by private individuals if they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-state actors.⁶⁰ This supports the position that the prime responsibility to promote and protect human rights lies with the contracting State Party, having ratified the relevant international human rights treaties.

195. As it pertains to the allegations of the assault meted on the Victim and his wife, which led to her miscarriage, the Respondent avers that it had no knowledge of the incident prior to the institution of the Communication. In examining States' obligation to investigate incidents of torture or ill-treatment, the UN Committee against Torture has held in the case of *Henri*

⁵⁸ As above.

⁵⁹ Communication 245/02 – *Zimbabwe Human Rights NGO Forum v Zimbabwe* paras 179 to 181

⁶⁰ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008 art 18; General Comment No 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (2017) para 73.





Unai Parot v. Spain that the obligation to ensure a prompt and impartial investigation does not depend on the submission of a formal complaint.⁶¹ It is sufficient for torture or ill-treatment to have been alleged by the victim.⁶² In view of this, the Commission considers that given the hostile invasions and attacks the Victim experienced following the announcement of his candidacy for MDC from May 2000 to January 2005, the Respondent State cannot claim ignorance of the incidents alleged in the absence of a formal complaint. The Commission also notes the Complainant's averments in paragraph 10 above that the incidents were documented and a complaint submitted to the Minister of State Security, Minister of Home Affairs and Head of Agritex. This was not disputed by the Respondent State.

196. Taking into consideration the above analysis, the Commission finds that the failure to effectively investigate the vicious assault and ill-treatment of the Victim and his wife amounts to a violation of the Respondent State's obligation under Article 5 of the African Charter. The Commission further considers that as it pertains to the allegation of extra-judicial killings and the rape of the Victim's employees, such averments ought to have been the subject of a separate Communication on behalf of the affected persons, to provide a detailed narrative of these incidents and the names of the alleged victims. In the absence of these details, the Commission is not in a position to make a finding in this regard.
197. Regarding the alleged assault at the police station when the Victim was arrested on 9 October 2002 in Mutare, the Commission maintains that the specific details of the assault was not stated and so it becomes difficult to make a finding of torture in this regard.
198. The Complainant further contends that the punishment imposed by the Privileges Committee (15 months imprisonments with hard labour, 3 months of which was suspended) was inhuman and grossly disproportionate to the seriousness of the offence committed by the Victim, when other non-custodial punishment would have been appropriate. It is important to note that a custodial sentence, once inherent in or incidental to lawful sanctions, cannot ordinarily be said to constitute torture, inhuman or degrading treatment. However, the emerging position under international law favours the idea that a grossly disproportionate sentence could constitute cruel, inhuman and degrading punishment. Most notably, the European Court of Human Rights (ECtHR) held in

⁶¹ Communication 6/1990, *Henri Unai Parot v. Spain*, (2 May 1995) UNHR Committee against Torture, U.N. Doc. A/50/44 at 62 (1995) para 10.5.

⁶² As above.





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Vinter v The United Kingdom that the 'whole life order' which provided convicted persons no possibility of parole or release irrespective of rehabilitation or good behaviour violated Article 3 of the European Convention on Human Rights (prohibition against inhuman treatment).⁶³

199. Distinguished from the above matter, the present Communication focuses on the excessive nature of the punishment, in relation to the offence for which the sentence was imposed. In assessing whether the sentence was indeed grossly disproportionate, the Commission must consider the gravity of the offence, the personal characteristics of the victim, and the particular circumstances of the case.
200. In this regard, the Commission observes that in Civil Application 16/05 *Roy Leslie Bennett v Emmerson Dambudzo Mnangagwa & 6 Others*, the Supreme Court of Zimbabwe succinctly outlined the gravity of the Victim's offence in page 28 of its decision where it noted that "...an assault on a Minister of Government and the Leader of the House during Parliamentary proceedings must rank amongst the worst cases of contempt of Parliament. It is akin to assaulting a judge during court proceedings."⁶⁴ Thus, while the offence of 'common assault' such as shoving a person, may not ordinarily be considered sufficiently harmful to warrant a custodial sentence, the Commission considers that the context in which the assault occurred aggravated the severity of the punishment imposed. Also, the Commission notes the observations of the Supreme Court that in addition to violating the dignity of Parliament, evidence on record indicated that the Victim "bragged and boasted about what he had done",⁶⁵ further aggravating the incident.
201. On the criteria of personal characteristics of the Victim, the Commission in *Huri-laws v Nigeria* has held that treatment impugned as torture, cruel, inhuman or degrading must attain a minimum level of severity.⁶⁶ Determining this level of severity is largely dependent on variables such as the duration of the treatment, its physical or mental effect, the age, sex and state of health of the Victim.⁶⁷ No argument or evidence has been advanced as to whether the physical condition of the Victim made the prison sentence much more severe than would otherwise be the case.

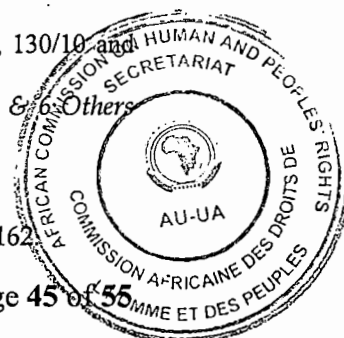
⁶³ *Vinter and Others v. The United Kingdom* ECtHR (July 2013) Application 66069/09, 130/10 and 3896/10 paras 110 to 111.

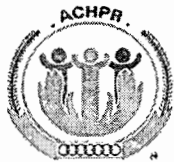
⁶⁴ Civil Application 16/05 - *Roy Leslie Bennett v Emmerson Dambudzo Mnangagwa & 6 Others* (Annex I of the Complainant's Merits submission) 28.

⁶⁵ (As above) 29.

⁶⁶ Communication 225/98 - *Huri-laws v Nigeria* para 41.

⁶⁷ *Ireland v. United Kingdom*, ECtHR (13 December 1977) Application 5310/71 para 162.





202. Finally, the Commission notes that pursuant to sections 16 and 21 of the Privileges Act, Parliament may impose a maximum term of two (2) years imprisonment depending on the severity of the case of contempt. Given that a lesser penalty than the maximum penalty required by law was imposed, and taking into consideration the severity of the offence and circumstances of the case, the Commission is of the view that the alleged violation of Article 5 has not been proven by the Complainant, as it relates to the custodial sentence imposed on the Victim.

Alleged violation of Article 6 of the African Charter

203. Article 6 of the African Charter provides for the right to liberty and security of a person, and prohibits the unlawful and arbitrary arrest and detention of any person. The Commission has held in *Article 19 v Eritrea* that the concept of 'arbitrary detention' should not only be equated with 'against the law' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.⁶⁸

204. The Commission notes that the Respondent State denies the allegations raised by the Complainant on the Victim's arrest and detention on spurious charges with no access to legal representation. The Respondent State admits that the Victim was arrested on 9 October 2002, on reasonable suspicion that he could have committed an offence under the Electoral Act. The charges were withdrawn due to lack of sufficient evidence for a prima facie case. The Victim however complained that he was denied access to his lawyers. An allegation the Respondent State refuted by general denial.

205. The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) provides for the right of an accused person to "[a]ccess without delay [his/her] lawyer or other legal service providers, at the latest prior to and during any questioning by an authority, and thereafter throughout the criminal justice process.⁶⁹ Hence, the Victim's remand without allowing him access to a legal representative of his choice amounts to a violation of Article 6.

Alleged violation of Articles 7 of the African Charter

⁶⁸ Communication 275/03 – *Article 19 v Eritrea* para 93.

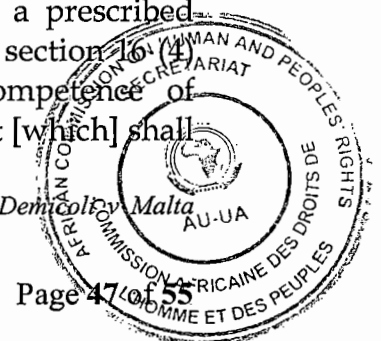
⁶⁹ Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines) 2014 principle 8 (d) (i).





206. The Complainant alleges a violation of Article 7 (1) (d) of the African Charter which provides for:
(d) the right to be tried within a reasonable time by an impartial court or tribunal
207. The Complainant raises the allegation that members of the Privileges Committee were judges in their cause, as the majority were members of ZANU PF, an aggrieved party, in breach of the rules of natural justice. The Complainant argues that the Victim's case ought to have been heard according to the rules guiding a competent court of law, rather than by the mere moving of a motion setting out the allegation followed by a debate and voting. In response, the Respondent State contends that the Victim was charged with contempt of Parliament and not ZANU PF, and argues that the jurisdiction of Parliament is *sui generis*, as such it does not sit as a court of law.
208. Before delving into the specifics of the above arguments, the Commission must first address the Complainant's arguments with respect to the standard of proof necessary in criminal cases. Indeed, the Commission agrees with the Complainant that this standard is 'proof beyond reasonable doubt'. However, it is unclear what point this seeks to buttress, as the alleged incident was witnessed by numerous members of Parliament and has not at any point been denied by the Complainant. The standard of proof - which relates only to the veracity of the facts in issue, has unquestionably been satisfied. That is to say, there could have been no reasonable doubt that the Complainant committed the acts of which he was accused.
209. The issue therefore can be broadly addressed in two questions: (1) whether the Privileges Committee constituted a tribunal for the purposes of trying the Complainant; and (2) whether the principles of fair trial as guaranteed under Article 7 of the African Charter were adhered to, notwithstanding that ZANU PF was in the majority.
210. Drawing inspiration from the jurisprudence of the ECtHR, the Commission notes that in *Belilos v Switzerland* the ECtHR held that "a tribunal is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner..."⁷⁰ In view of this, the Commission observes that section 16 (4) of the Privileges Act describes the jurisdiction and competence of Parliament in handling cases of contempt as follows: "a court [which] shall

⁷⁰ *Belilos v Switzerland* ECtHR (29 April 1988) Application 10328/83 para 64; *Demicolffy v Malta* ECtHR (15 October 1991) Series A No 210, Application 13057/87 paras 39 to 40.





have all such rights and privileges of a court of record as may be necessary for the purpose of summarily inquiring into and punishing the commission of any act..." As such, the Commission considers that the fact that the Privileges Committee does not formally make decisions, but makes recommendations does not diminish the strict requirements of adhering to procedural fairness. In light of the forgoing, the Commission finds that the Privileges Committee was indeed exercising a judicial function in determining the Victim's guilt, and as such, it is bound by the principles of fair trial that govern such bodies and processes.

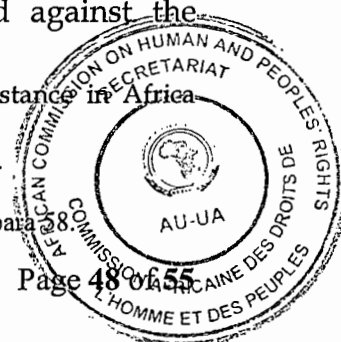
211. The Complainant argues that the application of the law by the Privileges Committee was biased and retributive due to its composition. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principles and Guidelines on Fair Trial) stipulates that for a tribunal to be deemed impartial, its decision must be based on objective evidence, arguments and facts presented before it, without any improper influence, inducement, threats or interference.⁷¹ The Commission in determining the existence or non-existence of bias has previously adopted the subjective and objective approach applied by the ECtHR.⁷² In *Dawit Isaak v Republic of Eritrea* the Commission noted that the subjective approach seeks to ascertain the existence of bias by 'assessing the personal conviction of a given judge in a given case', while the objective approach simply asks whether the same judge offered guarantees sufficient to exclude any legitimate doubt of impartiality.⁷³
212. In the present Communication, the application of the subjective approach seems certain to taint all members of parliament, including members of MDC, from adjudicating on matters of contempt of Parliament by any Member of Parliament, due to their party affiliations. This approach is not applicable in this instance, as it would have the effect of robbing Parliament of the power to impose disciplinary measures and govern its own internal affairs as authorised by sections 49 and 13 (2) (b) of the 1980 Constitution of Zimbabwe.
213. On the objective test, the ECtHR has held that in determining whether there is a legitimate reason to fear that a particular body lacks impartiality, what is decisive is whether the fear can be seen as objectively justified.⁷⁴ In *Demicoli v Malta* the ECtHR examined the question of impartiality as it concerned contempt of Parliament proceedings instituted against the

⁷¹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa principle A (5) (a).

⁷² *Piersack v Belgium* ECtHR (1 October 1982) Application 8692/79 paras 30 and 31.

⁷³ Communication 428/12 – *Dawit Isaak v Republic of Eritrea* para 32.

⁷⁴ *Ferrantelli and Santangelo v Italy* ECtHR (7 August 1996) Application 19874/92 para 88.





applicant for the publication of a satirical article commenting on a particular debate in the Maltese House of Representatives. The Court found that the fact that the "two Members of the House whose behaviour in Parliament was criticised in the impugned article and who raised the breach of privilege in the House participated throughout in the proceedings against the accused...the impartiality of the adjudicating body...would appear to be open to doubts and the applicant's fears in this connection were justified."⁷⁵

214. In the present Communication, the Commission notes that the Privileges Committee which deliberated on the guilt and sentence of the Victim was chaired by the same Member of Parliament who raised the breach of privilege and moved a motion for the establishment of the Committee. This clearly raised doubts in the mind of the Victim as to the impartiality of the Privileges Committee. Accordingly, the concern was raised before the Privileges Committee which ruled that no ground of bias or conflict of interest had been established.⁷⁶ The Commission however considers that a motion expresses the opinion and desires of a Member, and in this instance, the Chairperson had clearly inferred the guilt of the Victim when he stated that: "...Honourable Chinamasa was addressing the House and [was] violently shoved to the ground together with Honourable Mutasa who had risen to render assistance to Honourable Chinamasa **thereby assaulting them.**"⁷⁷ (Emphasis Added)

215. In this sense, it can be said that the procedural shortcomings allowed the Chairperson exercise the dual function of both complainant and adjudicator, in contravention of the natural justice principle that no one should be a judge in his or her own cause. Therefore, the Commission considers that having subjected the Victim to what was, in essence, a criminal trial, appropriate safeguards of natural justice ought to have been followed. Accordingly, the Commission find a violation of Article 7 (1) (d) of the African Charter.

Alleged violation of Articles 10, 11 and 13 of the African Charter

216. Article 10 (1) and 11 of the African Charter provides for the right to free association and assembly with others, while Article 13 (1) provides for the right of every citizen to participate freely in the government of his country, directly or through freely chosen representatives in accordance with the law.

⁷⁵ *Demicoli v Malta* (n 70 above) para 41.

⁷⁶ Civil Application 16/05 (n 64 above) 6.

⁷⁷ (As above) 3.





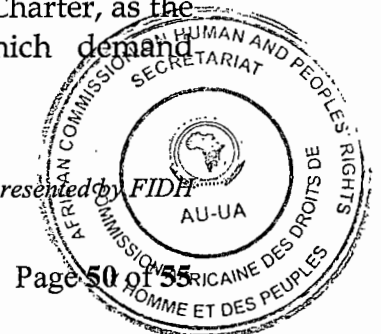
217. The Commission notes the Complainant averments that the Victim was persecuted particularly for his membership of the opposition party and his race. The Respondent State however denies complicity in the acts alleged by the Complainant. As elaborated in the Commission's Guidelines on Freedom of Association and Assembly in Africa (the Guidelines), the right to freedom of association protects: expression, criticism of government action, advancement of rights of marginalized groups and all other conducts permissible under international law, which includes the right to establish and join political parties.⁷⁸
218. The Commission has also held that the rights to freedom of association and assembly are both individual and collective rights, as such, States are mandated to respect the rights of associations to conduct their activities without threats, harassment, interference, intimidation or reprisal of any kind.⁷⁹ As previously elucidated, the Complainant's assertion that the Victim was targeted on the basis of his race has not been substantiated. However, the Commission considers the Complainant's submission that the invasion of the Victim's property was preceded by a speech delivered by the President on 12 June 2003, in which it was inferred that the Victim should be run off his land, as he was disloyal by virtue of his support for MDC.
219. The Commission therefore finds that even though the culprits may not have been operatives of the State, the Respondent State is however implicated in the violations which ensued, as the attacks were motivated by the speech of the President targeting the Victim due to his political association and opinion in violation of Articles 10 (1), 11 and 13 (1) of the African Charter.

Alleged Violation of Article 14 of the African Charter

220. Article 14 of the African Charter provides that the right to property can only be encroached upon in the interest of public need or in the interest of the community, and in accordance with the provisions of the relevant laws.
221. The Complainant alleges that the unlawful seizure of the Victim's property amounts to a violation of Article 14 of the African Charter, as the expropriation did not meet international standards which demand

⁷⁸ Guidelines on Freedom of Association and Assembly in Africa 2017 para 28.

⁷⁹ Communication 379/09 – *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* para 118; the Guidelines (as above) para 29.





restitution and/or compensation. The Respondent State however contends that the seizure was in accordance with the domestic law and in the public interest.

222. The Commission has held in paragraph 176 above that the compulsory acquisition of land by the Respondent State, with the purpose of redressing the inequitable distribution of land in Zimbabwe is indeed a legitimate purpose, as a well implemented land reform programme could lead to an increase in production and growth in all sectors. The contention, instead lies in whether or not the Victim's land was lawfully expropriated in accordance with the laid down procedure. Section 8(1) of the Land Acquisition Act stipulates that where a preliminary notice of acquisition has been published in the Gazette, the acquiring authority may then serve an order on the owner, not less than thirty (30) days after the date of publication in the Gazette. Section 9 (1) (b) also indicates that "...the making of an order in terms of subsection (1) of section 8 shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land 45 days after the date of service..."⁸⁰

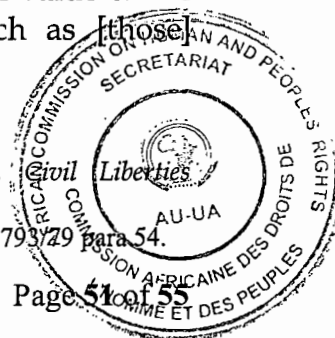
223. The above procedure was however not applied in the Victim's case. The Commission notes the Complainant's submission that Charleswood Estate is presently being operated by the Agricultural and Rural Development Authority, a government parastatal. The Commission considers that even though the Respondent State did not authorize the invasion of the Victim's land, the State nonetheless failed in its obligation to restore the property to the Victim, and follow the legal process in the acquisition of the Victim's property. The Commission reiterates its jurisprudence in *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria* that the right to property necessarily includes the right not to have one's property invaded or encroached upon.⁸¹

224. On the issue of payment of adequate compensation, the Commission considers the reasoning of the ECtHR in *James and others v The United Kingdom* where it held that taking property without payment of an amount reasonably related to its value would constitute a disproportionate and unjustifiable interference with the right to property.⁸² The ECtHR further noted that compensation need not necessarily reflect the full value of the property, as "legitimate objectives of public interest, such as [those]

⁸⁰ Land Acquisition (Amendment) Act 2002.

⁸¹ Communication 140/94; 141/94; 145/95 - *Constitutional Rights Project, Civil Liberties Organization and Media Rights Agenda v Nigeria* para 54.

⁸² *James and Others v The United Kingdom* ECtHR (21 February 1986) Application 8793/79 para 54.





pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value".⁸³

225. Section 29C (1) of the Land Acquisition Act stipulates that compensation shall "only be payable for any improvements on or to the land..." and vests the responsibility to compensate owners for the value of their land on the former colonial power (the British Government). The Commission considers that in applying the above reasoning of the ECtHR, the Respondent State is clearly under no obligation to compensate the Victim for the full market value of the land. However, the Commission considers that taking into consideration the nature of the Victim's ownership (legitimate purchase), an assessment of compensation ought to have taken into consideration factors such as: the history of ownership, use and occupation of the land, and any financial constraints which may necessitate the payment of compensation in installments over a period of time.

226. The Respondent State may legitimately expropriate land for public interest provided that it complies with international principles guiding such procedures. A key requirement being that compulsory acquisition of property must be in accordance with the law accompanied by appropriate and timely compensation. The Commission notes that compensation was not provided to the Victim for the expropriation of his property, and even though the Respondent State concedes that the Victim is entitled to be compensated for only the improvements on the land, its delay in doing so and the manner the land was taken, amounts to a violation of Article 14 of the African Charter.

Alleged Violation of Article 18 of the African Charter

227. Article 18(3) of the African Charter provides that:
The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

228. The Complainant avers that the invasion of the Victim's farm and subsequent occupation led to his pregnant wife being held hostage in the rain at machete point, and as a result she suffered a miscarriage. In response, the Respondent State again denies complicity and contends that

⁸³ (As above) para 54; *Former King of Greece and Others v Greece* (28 November 2002) Application 25701/94 para 78.





there is no indication that the Complainant reported the incident to the police.

229. The issue of State responsibility for the actions of non-state actors have already been determined above. The Commission has held in *Zimbabwe Human Rights NGO Forum v. Zimbabwe* that the duty of the Respondent State is in four-folds, it includes an obligation to respect, protect, promote and fulfil human rights.⁸⁴ The obligation to protect entails not only the enactment of appropriate legislation and effective enforcement, but also the protection of all persons within its jurisdiction from damaging acts that may be perpetrated by private individuals.⁸⁵

230. As earlier noted, the due diligence standard encompasses the obligation to provide and enforce sufficient remedies, this include taking active steps to prosecute and punish private actors who interfere with the rights protected under the African Charter. In the present case, the Respondent State has not furnished any progress report on its investigation into the attack which allegedly led to the miscarriage suffered by the Victim's wife. An effective investigation must be conducted promptly, and capable of leading to the identification and punishment of those responsible.⁸⁶ It must also identify the systematic failures that led to the violation, and the necessary measures to be adopted to guarantee non-repetition.⁸⁷ The Commission therefore finds that the failure to investigate and bring the perpetrators to justice violates Article 18 (1) and (3) of the African Charter, as the State failed in its duty to protect the Victim's family, more so as the attack followed the speech by the President inciting the criminal acts perpetrated on the Victim's land.

Alleged Violation of Article 1 of the African Charter

231. The Complainant contends that the failure of the Respondent State to protect the Victim, his family and employees amounts to a violation of Article 1 of the African Charter.

232. The Commission has held that Article 1 imposes a general obligation on States to respect, protect and fulfil the rights enshrined in the African Charter.⁸⁸ In *Commission Nationale des Droits de l'Homme et des Libertés v*

⁸⁴ Communication 245/02 – *Zimbabwe Human Rights NGO Forum v. Zimbabwe* para 151.

⁸⁵ (As above) para 152.

⁸⁶ United Nations (UN) "Istanbul Protocol- Manual on the effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment" 2004 17 available at <https://www.achpr.org/legalinstruments/detail?id=24> (accessed 14 December 2021).

⁸⁷ As above.

⁸⁸ Communication 279/03, 296/05 – *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v Sudan* para 227.





Chad, the Commission further held that "if a State neglects to ensure the rights in the African Charter, this can be constitute a violation [under article 1], even if the State or its agents are not the immediate cause of the violation."⁸⁹ In the present Communication, the Commission has reached a conclusion that the Respondent State failed to protect the Victim and his family against discrimination, cruel and ill-treatment, and failed to guarantee his right to an impartial tribunal, access to a legal representative and his right to property. Consequently, the Commission finds that the Respondent State is in violation of Article 1 of the African Charter.

Decision of the Commission on Merits

Based on the above reasons, the African Commission on Human and Peoples' Rights holds as follows:

- i. That the Respondent State - the Republic of Zimbabwe has violated Articles 1, 2, 3, 5, 6, 7(1) (d), 10 (1), 11, 13 (1), 14 and 18 of the African Charter on Human and Peoples' Right;
- ii. Requests the Republic of Zimbabwe to:
 - a. Pay fair and adequate compensation to the Victim named in this Communication for the compulsory acquisition of Charleswood Estate and all his other properties acquired pursuant to the Land Acquisition (Amendment) Act 2002, including compensation for the land and all improvements therein, and the loss of his farm equipment and livestock, in accordance with the principles guiding expropriation of private property under international law;
 - b. Promptly and independently investigate, prosecute and punish all non-State actors responsible for the incidents of rape of the Victim's employees, cruel and ill-treatment suffered by the Victim and his wife, the destruction of property and other violations of rights of all affected persons who were lawfully residing on the Victim's farms.
- iii. Inform the Commission, in accordance with Rule 112 (2) of the Commission's Rules of Procedure (2010), within one hundred and

⁸⁹ Communication 74/92 – *Commission Nationale des Droits de l'Homme et des Libertés v. Chad* para 20.





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eighty days (180) of the notification of the present decision of the
measures taken to implement the present decision.

**Done during the 70th Ordinary Session, held virtually from 23 February to 9
March 2022.**



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